# Judgments of the Administrative Tribunal of the International Labour Organization:

## 90th Session

## (October 2000-January 2001)

International Labour Office
Geneva

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ISSN 0378-7362

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*First published in 2001*

Annual subscription: 70 Swiss francs

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**The Administrative Tribunal is competent to hear complaints against international organisations that have recognised its jurisdiction. These organisations are the following (in order of recognition):**

International Labour Organization (ILO), including the International Training Centre
World Health Organization (WHO), including the Pan American Health Organization (PAHO)
International Telecommunication Union (ITU)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Meteorological Organization (WMO)
Food and Agriculture Organization of the United Nations (FAO)
European Organization for Nuclear Research (CERN)
World Trade Organization (WTO)
International Atomic Energy Agency (IAEA)
World Intellectual Property Organization (WIPO)
European Organisation for the Safety of Air Navigation (Eurocontrol)
Universal Postal Union (UPU)
European Southern Observatory (ESO)
Intergovernmental Council of Copper Exporting Countries (CIPEC)
European Free Trade Association (EFTA)
Inter-Parliamentary Union (IPU)
European Molecular Biology Laboratory (EMBL)
World Tourism Organization (WTO)
European Patent Organisation (EPO)
African Training and Research Centre in Administration for Development (CAFRAD)
Intergovernmental Organisation for International Carriage by Rail (OTIF)
International Center for the Registration of Serials (CIEPS)
International Office of Epizootics (OIE)
United Nations Industrial Development Organization (UNIDO)
International Criminal Police Organization (Interpol)
International Fund for Agricultural Development (IFAD)

**International Union for the Protection of New Varieties of Plants (UPOV)**
**Customs Co-operation Council (CCC)**
**Court of Justice of the European Free Trade Association (EFTA Court)**
**Surveillance Authority of the European Free Trade Association (ESA)**
**International Service for National Agricultural Research (ISNAR)**
**International Organization for Migration (IOM)**
**International Centre for Genetic Engineering and Biotechnology (ICGEB)**
**Organisation for the Prohibition of Chemical Weapons (OPCW)**
**International Hydrographic Organization (IHO)**
**Energy Charter Conference (ECC)**
**International Federation of Red Cross and Red Crescent Societies**
**Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom)**
**European and Mediterranean Plant Protection Organization (EPPO)**
**International Plant Genetic Resources Institute (IPGRI)**

***Registry's translation,***
***the French text alone***
***being authoritative.***

# NINETIETH SESSION

***In re* Bals and others** **Judgment No. 2003**
***In re* Pelsmaekers**

**THE ADMINISTRATIVE TRIBUNAL,**

**Considering the complaints filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 26 November 1999 by Mr Steven Pelsmaekers and on 28 November 1999 by Mr Peter Bals, Mr Jan Bellen, Mr Patrick Bout, Mr Dirk Ceyssens, Mr Frédéric Deleau, Mr Ralf Erdmann, Mr Dietmar Gorny, Mr Francis Loyens, Mr Jean Mangelschots, Mrs Raymonde Massa, Mr Peter Matern, Mrs Josette Noelmans, Mr Etienne Poelmans, Mr Michael Ramus, Mr Silvio Scharte, Mr Hubert Verheyen, Mr Bert Verstappen and Mrs Renilde Wijnants, Eurocontrol's replies of 10 March 2000, the complainants' rejoinders of 19 May and the Agency's surrejoinders of 25 August 2000;**

**Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. Article 70, "Expenses", of the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre says:**

> "A servant shall be entitled, as provided in a ruling of the Director General, to reimbursement of expenses incurred by him on taking up appointment, transfer, or leaving the service, and also to reimbursement of expenses incurred by him in the course of, or in connection with the performance of his duties."

Rule of Application No. 8 of the Staff Regulations, which is about reimbursement of expenses, provided in the version of Article 1(1) which applied at the material time that:

> "An installation allowance equal to two months' basic salary in the case of an official who is entitled to the household allowance or to one month's basic salary in other cases shall be paid to an established official who qualifies for expatriation allowance or who furnished evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations."

Under Article 20 of the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre:

> "A servant shall reside either in the place where he is employed or at no greater distance therefrom as is compatible with the proper performance of his duties."

The complainants joined Eurocontrol at various dates between 1971 and 1994 and serve at Maastricht. They submit that, shortly after becoming permanent staff members, they asked the Administration for application forms for the installation allowance but were told that they were not eligible for the allowance.

They subsequently received the appropriate forms and in February and early March 1999 they each sent in an application to the Administration with a formal request for the allowance. Having received no reply they submitted identical internal complaints in July 1999 to the Director General. The matter was referred to the Joint Committee for Disputes. In its single report of 5 August 1999 the Committee recommended rejection on the grounds that both the complainants' formal requests and internal complaints were filed too long after their establishment as permanent staff to be receivable. It added that, legally speaking, their formal requests and internal complaints together constituted a "complaint" against the Administration's earlier rejection of their requests for the allowance, implicit in its refusal to send them the necessary application forms. By letters of 19 August 1999, the Director of Human Resources told each of the complainants that the Director General had endorsed the Committee's recommendation. In the Director General's view, the complainants' action was not a "request" within the meaning of Article 91(1) of the General Conditions of Employment but an internal complaint under Article 91(2), which as such was out of time. He further considered that the internal complaint was unfounded in law because the complainants had incurred no actual installation expenses. That is the decision they are impugning.

B. The complainants submit that the rules establish no time limit for the filing of a request. Since the existence of a time bar may not be presumed, the Joint Committee for Disputes had no basis in law for its finding that their requests were irreceivable because they were out of time. What is more, another staff member, Mr C., applied for the installation allowance six years after becoming established and was granted it.

Not until February and March 1999, after they had received the application forms from the Administration, did they apply formally for the allowance. Consequently, those formal requests they made may not now be dubbed "complaints against the Administration's refusal to send them the application forms ... at the time of their establishment as permanent officials".

The complainants have three pleas on the merits. The first is breach of Article 1 of Rule of Application No. 8. Under Article 1 as amended by Office Notice No. 11/99 issued on 17 August 1999, the installation allowance is no longer payable to officials who qualify for the expatriation allowance but only to those who furnish evidence of having been obliged to change their place of residence in order to comply with Article 20 of the Staff Regulations. The complainants, however, filed their requests well before 17 August 1999 and so fall under the old Article 1, which grants the allowance either to established officials who qualify for the expatriation allowance or to those who provide evidence of having had to change their place of residence. Being entitled to the expatriation allowance, the complainants also qualify for the installation allowance and need not show that they had to change residence or incurred expenses.

Secondly, the Agency disregarded the principle of equal treatment. Another official, Mr Berger, was not required to change his place of residence on joining Eurocontrol and did not apply for the installation allowance until two years after his recruitment. Yet the Agency granted him the allowance even though he had incurred no expenses. (See Judgment 1903 *in re* Berger.)

Thirdly, there were no valid grounds for the decision of 19 August 1999.

The complainants ask the Tribunal to quash the impugned decision; order Eurocontrol to pay them the installation allowance plus interest at the rate of 10 per cent a year as from the date each formally requested the allowance; and award costs in an amount of 100,000 Belgian francs for Mr Pelsmaekers and 150,000 francs for each of the other complainants.

C. In its replies Eurocontrol submits that the complaints are irreceivable. Either the complainants had their requests for the installation grant rejected "shortly after becoming permanent staff members" (as they contend), or they applied for the allowance for the first time in February or March 1999. In the first hypothesis, they failed to file internal complaints against the rejections within the three months prescribed in Article 91(2) of the General Conditions of Employment; in the second, their applications were out of time.

The Agency argues that even though Mr Berger did not apply for the installation allowance until two years after becoming a permanent staff member, his case was different: since he constantly followed up his request to the Administration, the Joint Committee for Disputes considered that he should be given the benefit of the doubt as to receivability; the complainants, on the other hand, did nothing for several years.

On the merits, the Agency asserts that ever since it has existed it has always refused to pay the installation allowance to staff who receive the expatriation allowance but have not changed their place of residence. It interpreted the rules in their context and according to their intent and concluded that only staff members who actually incurred installation expenses were entitled to claim their reimbursement. That was also the practice in the European Communities. In over thirty-five years no one had challenged the practice until, in the context of Mr Berger's complaint, a recent precedent was found in the case law of the Court of First Instance of the European Communities (Lozano Palacios v Commission) and the

Court of Justice of the European Communities (Commission v Lozano Palacios). According to that precedent, under the provisions in force in the European Communities (the wording of which is identical to that of Article 1 of Rule of Application No. 8), the installation allowance is payable to a beneficiary of an expatriation allowance, there being no need for the beneficiary to show the existence of actual expenses. Admittedly those rulings are based on a literal interpretation of Article 1(1) of Rule of Application No. 8 which, if applied to the complainants, would mean granting them the allowance because they receive the expatriation allowance without actually having changed residence. However, says the Agency, that literal interpretation does not reflect the rule's intent.

Eurocontrol rebuts the allegation that it failed to give reasons in its replies of 19 August to the requests of February and March 1999 and the internal complaints of July 1999. It had every reason to view their formal requests for the allowance as internal complaints since the complainants themselves said that the Administration had originally refused to pay them the installation allowance. Furthermore, the letters of 19 August 1999 expressly refer to the reasoned opinion issued on 5 August 1999 by the Joint Committee for Disputes which the Director General endorsed.

D. In their rejoinders the complainants submit that, in Mr Berger's case, the Committee's opinion and the Director General's decision were based on the precedent set in the Lozano Palacios v Commission case, so Eurocontrol recognises that it endorsed that ruling.

They note that the Agency has not replied to the plea concerning Mr C.'s case.

The time limit for internal complaints being mandatory, they fail to see how it could have been extended on the grounds that Mr Berger "constantly followed up his request to the Administration".

E. In its surrejoinders Eurocontrol denies endorsing the precedent on which it granted Mr Berger the installation allowance.

It explains that its main reason for refusing the allowance to the complainants was that they were out of time. It adduced the absence of actual installation expenses only as a subsidiary plea.

It was as a result of an administrative mistake that Mr C. got the installation allowance six years after his establishment, and besides, unlike the complainants, he did have to change his place of residence.

## CONSIDERATIONS

1. The complainants are all employees of Eurocontrol and serve at Maastricht. In February and March 1999 they requested payment of the installation allowance provided for under Article 70 of the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre and in the version then in force of Article 1(1) of Rule No. 8 concerning reimbursement of expenses. Having learned that a colleague in like case had been granted the allowance, they considered that they too were entitled to apply for it. Having received no reply to their requests for the allowance, they lodged internal complaints under Article 91 of the General Conditions of Employment. Their cases were referred to the Joint Committee for Disputes, which, in its report of 5 August 1999, found their internal complaints to be out of time because they had filed them many years after being made permanent staff members. According to the Committee, their position was different from that of the staff member who had been granted the allowance, as their requests were "very late given the length of time they had been established – which in some cases [was] as long as twenty-seven years", and that their internal complaints were therefore irreceivable. The Committee added that "the stability in law which must govern relations between an organisation and its staff precludes exempting the persons concerned from the time bar, which the Tribunal is in any event bound to apply in the general interest".

2. The Director of Human Resources informed the complainants by decisions of 19 August 1999 that, pursuant to the Committee's recommendation, the Director General had rejected their internal complaints as time barred and hence irreceivable. Nineteen staff members of Eurocontrol are now impugning those decisions. The Tribunal will join their complaints.

3. The main issue of the cases is the receivability of internal complaints against a refusal to grant an allowance pertaining to their installation filed by officials many years after they became established staff members.

4. The complainants recall that, according to a long line of precedent, the time bar extinguishes obligations, so its existence may not be presumed. They add that, in their case, the time limit started to run only from the date on which the Administration first sent them the application forms for the installation allowance. They further argue that since two of their colleagues in like case obtained the allowance, the principle of equal treatment requires that they be granted the same benefit.

5. In rebuttal, Eurocontrol argues that the principle of legal certainty precludes the acceptance of applications that the complainants submitted between two years and four months and twenty-seven years and six months after their establishment, which is when they became eligible to apply for the allowance provided they met the requirements. And had their application met with a refusal, it would have been up to them to file an internal complaint within the three months specified in Article 91(2) of the General Conditions of Employment.

6. The complainants themselves admit that when they requested application forms for the allowance shortly after becoming permanent, the Administration replied that they were not entitled to the allowance insofar as they had incurred no installation expenses on taking up their appointments. Whether or not the Administration was right, its replies to the complainants' initial requests – which were made within a reasonable period of their establishment – constituted decisions which they could have challenged within the three months laid down in Article 91(2) of the General Conditions of employment, under which:

> "Any person to whom these provisions apply may submit to the Director General a complaint against an act adversely affecting him, either where the Director General has taken a decision or where it has failed to adopt a measure prescribed by the staff regulations. The complaint must be lodged within three months. The period shall start to run:
>
> - on the date of publication of the act if it is a measure of a general nature;

> - on the date of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification, if the measure affects a specified person; if however an act affecting a specified person also contains a complaint against another person, the period shall start to run in respect of that other person on the date on which he receives notification thereof but in no case later than the date of publication;
> - on the date of expiry of the period prescribed for reply where the complaint concerns an implied decision rejecting a request in [Article 91(1)].
>
> The Director General shall notify the person concerned of his reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under Article 92."

Since they were not challenged in time, those decisions became final and the complainants were barred from challenging them by filling up application forms years later and claiming the quashing of the decisions refusing them by implication the allowance for which their assignment to Maastricht made them eligible.

The Joint Committee for Disputes was right to cite the "principle of legal certainty which must govern relations between an organisation and its staff" and to note that it was not possible to "[exempt] the persons concerned from the time bar, which the Tribunal is in any event bound to apply since it is mandatory". The fact that Eurocontrol granted the allowance to one staff member *ex gratia* and to another by mistake is not in itself enough to warrant waiver of the time bar on the complainants' requests.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

# NINETIETH SESSION

***In re* Matthews** **Judgment No. 2004**

**THE ADMINISTRATIVE TRIBUNAL,**

**Considering the complaint filed by Mr Mark S. Matthews against the World Health Organization (WHO) on 22 November 1999 and corrected on 7 December 1999, the WHO's reply of 9 March 2000, the complainant's rejoinder of 12 April, the Organization's surrejoinder of 13 July, the letter from the Registrar of the Tribunal dated 9 August requesting further information and the Organization's submissions of 15 August 2000;**

**Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which neither party has applied for;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, an American national born in 1948, joined the Pan American Health Organization (PAHO) on 1 June 1995 as Chief of the Department of Finance at grade P.5. The PAHO, located in Washington D.C., serves as the World Health Organization's Regional Office for the Americas. On 1 April 1996 the complainant was promoted to the PAHO post of Chief of the Department of Budget and Finance at grade P.6.**

On 9 September 1998 he applied for the post of Director of the Department of Financial Services (grade D.2) at the WHO's headquarters in Geneva which had been announced in vacancy notice P98/70. There were approximately 650 applicants for this post and the complainant was one of the six that were short-listed. He was classified as an internal candidate because of the PAHO's relationship with the WHO. As part of the competition all six candidates took a three-hour written test and were interviewed. The complainant was the only candidate to be interviewed by video conference and not in person. During the written examination only the complainant noticed that the United States dollar and Swiss franc interest rates had been reversed in the test papers; however, both he and the selected candidate received perfect scores. Based on the written examination, the interview and an overall assessment the complainant was ranked third in the competition. The Selection Panel unanimously recommended an external female candidate for the post based on the fact that she had been placed first in all three categories. The Director-General accepted this recommendation. The complainant was informed by telephone that he had not been selected, and a system-wide e-mail announced Ms W. as the selected candidate on 21 January 1999.

Since the complainant, although a PAHO employee, was appealing against non-selection to a post at the WHO's headquarters, the WHO agreed that he could bypass the Regional Board of Appeal and submit his appeal directly to its Headquarters Board of Appeal. On 24 February 1999 he did so. In its report dated 30 June the Board recommended that the successful candidate's appointment be upheld and that his appeal be dismissed. On 27 August 1999 the Director-General informed the complainant that she accepted the Board's recommendations. That is the impugned decision.

In November 1999, the complainant was selected as the successful candidate in a competition for a D.1 post as the Director of Administration and Finance at the WHO's International Agency for Research on Cancer (IARC), but he turned it down.

B. The complainant makes three pleas. First, he argues that the competition and the appeal procedure were flawed by procedural errors. He claims that it is not possible that he and the successful candidate performed equally in the written examination because he was the only candidate to have noticed an error in the test papers. He has asked for the curriculum vitae of the successful candidate and other information on the scoring of the examinations which, he asserts, are necessary to prove his claims, but the Organization has refused his request. He contends that the Tribunal's case law supports disclosure of such information to an unsuccessful candidate. The Board of Appeal was also at fault: it failed to recognise the significance of the above-mentioned error and it did not address the main points that he challenged.

Secondly, he pleads unequal treatment. During the selection process he was the only candidate to be interviewed by video conference. This "clearly worked to his detriment" given the fact that his examination score was perfect. Furthermore, as an internal candidate he should have been given preference over an external candidate.

Thirdly, he contends that WHO Staff Regulations 4.2 and 4.3 were violated: selection based on gender was considered more important than appointing the most qualified candidate. During the selection process he was told by the Executive Director of the General Management Cluster (GMG) at the WHO that "there was a gender mountain to climb" because of the Director-General's policy of achieving a gender balance. He points to a speech made by the Director-General on 2 March 1999 in which she stated that "Cabinet has decided to secure that 6 out of 10 new appointments are women until parity is reached". This policy has resulted in discrimination based on gender and the appointment of an external female candidate over a qualified internal male candidate, which is in direct violation of the above-mentioned regulations. The complainant cites American and European case law to support his argument of discriminatory treatment.

He requests the Tribunal to: (1) declare the selection process void and order the WHO to hold a new competition for the post of Director of the Department of Financial Services; (2) pronounce that the selection of the successful candidate was "tainted with gender bias" in violation of the Staff Regulations and Rules; (3) declare that the policy of giving preference to female candidates discriminates against serving male staff, is contrary to Regulation 4.3 and is therefore *prima facie* void; (4) order that he be awarded the difference between his current salary and that which he would have received if selected, "for the balance of his career"; (5) award moral damages; and (6) award costs.

C. In its reply the WHO denies that the selection process was seriously flawed. In order to ensure equal treatment, each candidate was given the same written examination and subjected to the same time constraints. While it is true that the complainant noticed a reversal of interest rates in the test papers, this error is not as significant as the complainant believes. The test was not designed to assess technical skills but rather analytical and communication skills.

Even if the complainant did not have an interview in person, the procedure and the content of the interview were the same in his case as that of the other candidates: all candidates were asked identical questions in the same order. The interviews were conducted in this manner precisely to provide "a consistent and objective basis to assess candidates with full impartiality". Furthermore, interviewing candidates by video conference permits the Organization to open up the selection process to more people, which is in the best interests of the Organization and its staff. Although the WHO does not contest the receivability of the complaint in general, it objects to the plea regarding the interview, since the complainant did not address this issue before the Board of Appeal.

The Organization also contends that the selection process was not flawed by gender bias. An internal candidate must be given preference only when the candidates are equal; in this instance, after applying objective criteria, the selected external candidate was considered better qualified than the complainant, who was an internal candidate. It also points out that another male candidate ranked higher than the complainant.

According to the WHO the complainant's reliance on American and European case law is misplaced, as neither the Tribunal nor the Organization is bound by them. Nonetheless, the Organization has complied with its own rules and procedures and the Tribunal's case law. Regarding the disclosure of information about a selected candidate, the Tribunal's precedent is clear: such information must be made available to an appeals body, and the Organization shall produce this if requested by the Tribunal.

The WHO objects to the complainant's claim to an award of a salary differential. First of all, this presupposes that he would have been selected if the successful candidate had not been appointed and there is no basis for this supposition. Secondly, it cannot be presumed that he would have accepted the post given the fact that he turned down a D.1 post at the IARC.

Although Ms W., the successful candidate, was given by the Tribunal the opportunity to respond to the complainant's allegations, she chose not to do so.

D. In his rejoinder the complainant asserts that gender bias and discrimination are often subtly concealed. Although each flaw in the selection process, taken individually, does not provide proof of discrimination, "taken together, these shortcomings paint a clear picture of bias". For instance, an external female candidate who lives and works close to PAHO headquarters was flown to Geneva for an interview in person, whereas he was interviewed only by video conference.

He states that he will not address the Organization's comments regarding the candidate ranked second since he lacks the information necessary to do so.

The complainant explains that he did not accept the post with IARC because it "was at the same grade and level as the one he currently holds" and, therefore, did not represent a promotion; it is bad faith for the WHO to raise this matter.

E. In its surrejoinder the Organization asserts that it was proper to grant an interview in person to an external candidate who was unknown to WHO officials, that this is not proof of bias, and that it caused no harm to the complainant. Interviewing internal candidates by video conference can now be done at all regional offices, which enables the Organization to interview a larger number of candidates.

The complainant is wrong in asserting that there is a requirement that six out of ten appointees must be female. World Health Assembly Resolution 50.16 of 12 May 1997 calls for "the target for representation of women in the professional categories to be increased to 50%".

Consequently, the WHO seeks qualified female candidates to compete for posts.

Since the complainant has argued that there is a gender bias in selection, it is indeed relevant for the Organization to mention the fact that he was selected for a post at the IARC, even though he did not accept it.

F. On the Tribunal's instructions, the WHO has produced an internal memorandum and other documents pertaining to the Selection Committee's deliberations. Although the complainant was ranked equally with the selected candidate in the written examination, he was ranked fourth overall (and not third as previously noted by the Organization). Consequently, there were two other unsuccessful male candidates who were considered better qualified for the post than the complainant. One of them was also an internal candidate.

## CONSIDERATIONS

1. The complainant contests the decision of the World Health Organization (WHO) to appoint Ms W. to the post of Director of the Department of Financial Services of the WHO at grade D.2.

2. The complainant is a senior (grade P.6) staff member of the Pan American Health Organization (PAHO) which serves as the WHO's Regional Office for the Americas. On 9 September 1998 he applied for the position of Director of the Department of Financial Services of the WHO.

3. He was invited for interview by video conference for the position in early December 1998. The five other candidates on the WHO's short list were brought to Geneva, Switzerland, for an interview in person.

4. A test was distributed to the applicants. In his reply to the test, the complainant noted that there was a material error in the information that had been furnished to candidates, namely a reversal of interest rates for the United States dollar and the Swiss franc. It was later confirmed that the examination was indeed based on an erroneous hypothesis. The complainant was the only candidate to notice the error.

5. Ms W. was the selected candidate. The complainant was placed fourth, after Ms W. and two other male candidates.

6. The complainant filed a letter of notification of his intent to appeal against the decision of the Director-General on 24 February 1999. In that letter, he asked for details of the competition to enable him to assess the efficacy of the proceedings. On 4 March 1999, the Human Resources Services Department informed the complainant that no information would be provided, including the curriculum vitae of the selected candidate.

7. The Headquarters Board of Appeal considered the appeal and delivered its report, dated 30 June 1999, to the Director-General who notified the complainant, by letter dated 27 August 1999, of her decision to confirm the appointment of Ms W.

8. In its report, the Board concluded that:

> "the selection procedure had been properly carried out in accordance with WHO Rules and Regulations. The applicant with the highest overall score had been selected, and there was no evidence that gender bias had affected the selection procedures."

9. The Board further concluded that:

> "the selection of an external candidate over the Appellant (and the other internal candidate who was short listed) was justified by her higher overall score when the results of the written test and the interview assessment were combined."

(In fact, this finding is erroneous: the complainant was placed behind two external and one internal candidates, but the mistake is of no consequence.)

10. The following are the relevant provisions of the WHO Staff Regulations:

> "4.2 The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting and maintaining the staff on as wide a geographical basis as possible.
>
> 4.3 Selection of staff members shall be without regard to race, creed or sex. So far as is practicable, selection shall be made on a competitive basis.
>
> 4.4 Without prejudice to the inflow of fresh talent at the various levels, vacancies shall be filled by promotion of persons already in the service of the Organization in preference to persons from outside. This preference shall also be

> applied, on a reciprocal basis, to the United Nations and specialized agencies brought into relationship with the United Nations."

*Analysis*

11. The selection records were made available to the Headquarters Board of Appeal and it found that the complainant had been recommended as the third best candidate for the position. (As pointed out above, that finding was wrong, but the matter is of no consequence.) These documents contain a memorandum from the Executive Director of the General Management Cluster (GMG) recommending the appointment of Ms W. They also contain a table summarising the Selection Panel's detailed assessment of each candidate, based on the interviews and the written test.

12. According to the WHO, all six candidates on the short list were interviewed for approximately the same length of time. The same questions were posed to each candidate by the same Panel member in the same order. In all material respects, the circumstances surrounding the interviews were the same.

13. The complainant alleges that just prior to the interview, he asked the Executive Director of GMG why he was the only candidate who was not brought to Geneva for an interview in person. He alleges that he was told that his name had been added to the list at the last moment. He replied that he did not want to be "gender fodder" to protect the WHO from accusations of showing gender bias in the selection process. He was assured that his candidacy would be seriously considered. Additionally, the Executive Director is alleged to have told him that she was under some pressure due to the "overwhelming" number of senior male managers she had "reconfirmed in the rotation phase" and that "there was a gender mountain to climb". It is noteworthy that these serious and damaging allegations have not been denied or explained by the Organization. A suggestion by a very senior official (and the very person who later recommended to the Director-General to make the contested appointment) that a candidate is under a disadvantage by reason of gender cannot be just brushed off; that is wholly unacceptable.

14. The complainant also points out that another of the six short-listed candidates, a woman, was, like him, from the Washington area, yet she was flown to Geneva and was interviewed in person. The Organization alleges that to do so was reasonable, keeping in mind that the candidate in question was an external candidate, without any WHO performance record, who was unknown to WHO officials. The Organization's suggestion that it was not necessary to bring the complainant to Geneva is not acceptable. While the Tribunal is not to be understood as saying that a video conference is not a perfectly acceptable method of conducting interviews, care must always be taken to ensure that no candidate is given a potentially unfair advantage by that process. Flying one person across the ocean to be interviewed while leaving a competitor from the same area at home is open to the interpretation of unequal treatment.

15. The complainant alleges that failure to notice the interest rate reversal in the test papers was an important factor in assessing the candidates; the qualifications for the post of anyone who did not notice it must be called into question.

The WHO alleges that, whether or not the candidates mentioned the material error in the test data sheet, was far from being the most significant factor in assessing the test answers, nor was it a factor that could have led to the disqualification of any candidate who did not refer to it. The test was designed to assess the candidate's ability to synthesise financial information and data and to summarise it in an understandable way for a lay person. It was also designed to assess the candidates' ability to communicate clear information and advice and to do so in a short period of time, relying only on their own knowledge and experience. The Board of Appeal agreed with this conclusion.

16. Both Ms W. and the complainant obtained 30 points on the test, a perfect mark. The WHO has not denied that none of the candidates, with the exception of the complainant, noticed the error in the test papers. The test was a blind test with each candidate being assigned a number. The complainant's allegation that he ought to have received more marks than Ms W. presupposes that his skills in synthesising and summarising the data were equal to those of Ms W. The Organization has said that the

complainant's identification of the error was taken into account in the overall evaluation of his written replies to the test, although the material supplied to the Tribunal neither confirms nor negates this assertion. However, it is not the function of the Tribunal to mark the test. The Selection Panel was entitled to mark the test as it saw fit and award marks accordingly. It would be absurd to suggest that candidates who failed to notice the error should be eliminated from the competition. The purpose of the test remained valid in spite of the error found in it.

17. The complainant makes the serious complaint of gender discrimination.

The Headquarters Board of Appeal observed as follows:

> "The Board noted that the selected candidate had the highest overall score of all those short listed, including the Appellant. The Board agreed with the statement made by the Appellant, that 'the preference which internal candidates enjoy is to be applied where qualifications are equal', and that as an internal candidate he should indeed have priority over an external candidate, all else being equal. All else was not equal, however. The selected candidate had a higher overall score than the Appellant based on the results of the written test and their interviews. Indeed, the Appellant was third in the interview score, first in the test score (tied with the successful candidate), second in the total score (interview plus test) and third [sic] in the overall assessment score, while the successful candidate scored first in all cases. The Board was satisfied that the selection of the external candidate was justified."

And further:

> "The [Board] concluded that the selection procedure had been properly carried out in accordance with WHO Rules and Regulations. The applicant with the highest overall score had been selected, and there was no evidence that gender bias had affected the selection procedures."

18. Among the documents produced before the Board and the Tribunal and also furnished to the complainant was a memorandum from the Executive Director of the GMG recommending the appointment of Ms W. The following passages are relevant:

> "The applications were reviewed and assessed for suitability in a three stage process, first by GMG/HRS, then by my office and finally by the selection panel. At the end of each stage, the number of applications retained were respectively 270, 14, and 6 (3 male candidates of which one was an internal candidate and 3 female candidates).
>
> ...

> You will find annexed a table summarising the Panel's detailed assessment of each candidate as well as the curriculum vitae of all the candidates short listed by the panel.
>
> Four of those interviewed were rated as suitable for the position. But two external candidates, namely [Ms W. and Mr A.], significantly outranked the others in both the test score and the interview assessment.
>
> Given the current gender inequity in GMG (no female Directors) and the desirability of both International Organization experience and private sector investment experience, I would like to recommend that you consider [Ms W.] (who rated highest on total scores) for the post of Director FNS."

The Organization has not furnished the curriculum vitae mentioned in the memorandum. The memorandum is inaccurate in that Mr A. did not outrank the complainant in the test score. He received 22.5 points whereas the complainant got 30 points, the full mark.

19. Annexed to the memorandum was a table summarising the interview and test scores. There are two different final result columns – the total column and the assessment column. The total column is arrived at by adding the sub-total result (which is supposed to reflect the total marks for the interview but is not the arithmetical sum of the figures which precede it) to the test result. The actual sub-total of the interview marks has been multiplied by the figure of approximately 1.28 to bring the maximum possible total from 54.7 to 70. So that the respective weightings of the interview and the test were altered. There is no explanation why a higher value than the actual marks awarded was given.

According to the results in the total column Ms W. obtained 95.6/100, the complainant 85.2/100, Mr A. 83.3/100 and Mr S. 74.2/100. In the assessment column Ms W. and Mr A. were each awarded 4 out of 4, Mr S. 3.6 and the complainant 3.4. There is no explanation as to how Mr A. was given an equal assessment with Ms W. or how the complainant came fourth with an assessment of 3.4.

The Tribunal is left in the position that it has no way of assessing the fairness of the process which produced these results.

20. To support his claim of gender bias the complainant has produced an extract of the Director-General's speech of 2 March 1999:

> "The World Health Assembly has repeatedly called for gender parity. I intend to follow up on that call. Cabinet has decided to secure that 6 out of 10 new appointments are women until parity is reached."

The Tribunal wishes to emphasise that there is nothing wrong in having a policy aimed at gender parity. For too long women have been subjected to discrimination in appointments to senior posts which can be proved by statistics. But this policy cannot be achieved by setting quotas and by reverse discrimination, in other words, by the appointment – for particular posts – of women who are less qualified than men. This is contrary to Regulation 4.3 which provides that selection shall be "without regard to race, creed or sex". The policy can be achieved by different means such as actively encouraging qualified women to apply for senior posts, and by ensuring that work practices do not discourage women from applying. But the bottom line must always be that the person best qualified should be appointed. The quoted words of the Director-General could lead to the interpretation that a quota is being set.

21. In the particular circumstances of this case, it was highly irresponsible for the Executive Director of GMG to talk of "a gender mountain to climb" thus giving the impression to the complainant that he was at a disadvantage because of his sex. She was rightly censured by the Headquarters Board of Appeal for making such a remark.

But that remark pales into insignificance when compared with her memorandum to the Director-General announcing the results of the Selection Panel. In the assessment column of the table attached to it Ms W. was rated equally with a man, Mr A. As quoted above under 18 she said "Given the current gender inequity in GMG (no female Directors) :... I would like to recommend that you consider [Ms W.] (who rated highest on total scores) for the post of Director FNS".

This was an invitation to make the sex of Ms W. a factor in the choice of candidate. The Director did no favour to Mr A. who is an innocent third party to this affair.

In these circumstances, the Tribunal cannot let the appointment stand in light of this flaw in the appointment process. The Organization will have to hold another competition in which Ms W. can of course be a candidate.

22. The complainant's claim that he should receive the difference in salary between the D.2 grade and his current grade is not sustainable. He has not proved he would have been selected for the position had the competition not been flawed. He is at liberty to apply for the post again in the new competition.

He is entitled, however, to moral damages which the Tribunal assesses at 5,000 United States dollars.

## DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The appointment of Ms W. is set aside.
3. The case is sent back to the Organization.
4. The WHO shall pay the complainant 5,000 United States dollars in moral damages.
5. The WHO shall pay the complainant 1,000 dollars in costs.
6. All other claims are dismissed.

**In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K Hugessen

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

**Organisation internationale du Travail** — **International Labour Organization**

***Tribunal administratif*** — ***Administrative Tribunal***

***Registry's translation,***
***the French text alone***
***being authoritative.***

# NINETIETH SESSION

***In re* van der Kraan (No. 2)** **Judgment No. 2005**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the second complaint filed by Mr Pieter van der Kraan against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 21 January 2000, Eurocontrol's reply of 28 April, the observations submitted by Mr R. on 9 June at the Tribunal's request, the complainant's rejoinder of 8 August and the Agency's surrejoinder of 6 October 2000;**

**Considering Article II, paragraph 5, of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which neither party has applied for;**

**Considering the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, a Dutchman born in 1940, was recruited by Eurocontrol as an expert at grade A6 in 1972. At the material time, he held grade A4.**

**On 7 December 1998 the Agency issued a notice of competition, under reference HQ-98-AT/068, for the grade A3 post of Head of the Surveillance Unit for the European Air Traffic Control Harmonisation and Integration Programme (EATCHIP). In 1999 this programme became the European Air Traffic Management Programme (EATMP).**

The complainant applied for the above post on 3 February 1999. In a letter of 7 May the Head of the Recruitment, Selection and Staff Development Section informed him that his candidature had not been retained for the final selection process, since other candidates were more qualified than he for the post. He added that the Section was at his disposal if he wanted more detailed information. In a letter of 12 May the complainant asked him the reasons why his candidature was rejected. He received no reply. On 23 June he filed an internal complaint with the Director General pleading failure to substantiate the decision rejecting his candidature and obvious misappraisal of the facts. He sought the quashing of the above decision and the reopening of the selection procedure. The internal complaint was not submitted to the Joint Committee for Disputes for an advisory opinion, and went unanswered. On 1 December 1999 Mr R., the candidate selected through the competition, took up his duties as Head of the EATMP Surveillance Unit. On 21 January 2000 the complainant lodged the present complaint challenging the implied rejection of his internal complaint.

B. The complainant states that the Agency is in breach of Article 4 of the Annex to office notice 6/95, establishing the Joint Committee for Disputes, because it failed to obtain the Committee's opinion before dismissing his internal complaint. Citing Judgment 1768 (*in re* Bodar), he maintains that this flaw must result in the quashing of the implied rejection of his internal complaint and the resumption of the competition procedure at the point at which the breach occurred.

The complainant also alleges several violations of Article 6 of Rule of Application No. 2 of the Staff Regulations governing officials of the Eurocontrol Agency, concerning the selection test procedure. First, he contends that the Selection Board did not establish objective criteria for the assessment of the candidates' qualifications, or else was in breach of those criteria. In this connection, the complainant asks Eurocontrol to produce all documents relating to the competition process, in particular those concerning the work of the Selection Board. Secondly, the Board had "gone beyond its mandate" in considering that the complainant did not fulfill the qualifications required by the vacancy notice as well as the other candidates. Thirdly, the Board failed to submit a reasoned report to the

Director General, or else its reasons regarding the complainant were insufficient. He also alleges breach of Article 25 of the Staff Regulations in that the rejection of his candidature was not properly accounted for. Subsidiarily, he pleads obvious misappraisal of the evidence.

The complainant requests the Tribunal to set aside the Selection Board's decision "to leave him off the list of suitable applicants [for the post he was seeking] and not to retain him for the final selection process". He also seeks the quashing of the appointment of Mr R. as Head of EATMP Surveillance Unit and of the implied rejection of his internal complaint. He claims moral and material damages, and costs.

C. In its reply Eurocontrol recognises that the complainant's internal complaint was not submitted to the Joint Committee for Disputes and that it was not expressly answered. The appeal procedure thus showed the same flaws as that in the Bodar case. On the assumption that the Tribunal will come to the same decision here as in that case, the Agency explains that, since to await a predictable decision before remedying the flaw would be to prolong these proceedings and needlessly delay settlement of the dispute, it has decided to refer the internal complaint promptly to the Committee and to answer it expressly on receipt of the advisory opinion. Deeming the complainant's moral injury to be partly compensated by this decision, the Agency offers to pay him 1,000 euros in damages. It also undertakes to reimburse the costs he has incurred in filing the present complaint, which, in its opinion, need no longer be pursued.

Eurocontrol asks the Tribunal to record the Agency's decisions to rectify the flaw in the treatment of the complainant's internal complaint and its offer to cover the costs and compensate him for moral injury and, secondly, to note that a ruling is no longer required.

D. In his observations Mr R. states that it was in good faith that he participated in the competition and accepted the offer of employment. He stresses that the complainant did not question his capacity to satisfy the criteria listed in the notice of competition. He seeks protection from any injury should the Tribunal find the selection process flawed.

E. In his rejoinder the complainant explains that the Joint Committee for Disputes issued its opinion on his internal complaint on 25 May 2000 concluding that the complaint was justified by the absence of clear reasons for the rejection of his candidature. In this respect, it recommended in particular that the Director General's decision in response to the internal complaint should redress this "incidental oversight". However, the Committee considered the internal complaint to be unfounded insofar as it suggested that the work of the Selection Board was flawed. The complainant adds that, in a memorandum of 8 June 2000 the Director of Human Resources informed him that the Director General had decided to reject his internal complaint as devoid of merit.

The complainant contends that since the Agency admitted its failure to consult the Committee, it ought to have cancelled or revoked the decision implicitly rejecting his internal complaint, rather than urging him to drop his complaint to the Tribunal. He therefore asks the Tribunal to reject Eurocontrol's claims. He adds that the Committee's opinion and the decision of 8 June 2000 are insufficient to remedy the flaw tainting the decision to reject his internal complaint.

The complainant further contends that the decision to reconsider his internal complaint, far from partly compensating the moral injury has in fact aggravated it. By taking that decision, Eurocontrol has caused him "additional worry" and delayed settlement of the dispute. He considers Eurocontrol's proposed compensation "not nearly sufficient", and states that he has also suffered material injury in that his prospects of promotion have diminished. He explains that Mr R. is in the process of acquiring "useful experience" in the exercise of his new duties, which will allow him to obtain confirmation of his appointment to the post as Head of EATMP Surveillance Unit, irrespective of the outcome of the proceedings. The complainant submits an estimate of the damage he alleges to his career. He claims 150,000 Belgian francs in costs.

F. In its surrejoinder Eurocontrol notes that on 6 September 2000 the complainant lodged a third complaint against the decision of 8 June 2000 expressly rejecting his internal complaint of 23 June 1999. However, he has not withdrawn the present complaint.

As regards receivability, the Agency considers that at the time of filing his second complaint the complainant had a cause of action. Since he has obtained satisfaction from the express reply to his internal complaint, this is no longer the case so to prolong the present proceedings is pointless.

Eurocontrol further contends that its offer of compensation for moral injury is "more than reasonable" in that the decision to resume the appeal procedure at once at the point where it became flawed has already compensated the complainant in part. It adds that, at the time of his appointment Mr R. already held all the qualifications required to carry out the duties of Head of EATMP Surveillance Unit. The claim to material damages is therefore "unacceptable". Having called on the complainant to withdraw suit, Eurocontrol sees no reason to assume the costs he has incurred in pursuing proceedings which are now devoid of purpose. The defendant presses its claims but withdraws its offer to bear the costs.

## CONSIDERATIONS

1. Responding to a notice of competition, reference HQ-98-AT/068, the complainant, a principal expert at grade A4 at the Eurocontrol Agency, applied for the post of Head of the Surveillance Unit for EATCHIP, which in 1999 became EATMP, as indicated under A.

In accordance with the provisions of Articles 30 and 31 of the Staff Regulations, a Selection Board was appointed. It met on 13 April 1999. After examining the qualifications of the fourteen applicants, it retained four. The complainant was informed by a letter of 7 May 1999 that he had not been included in the short list.

On 23 June 1999 he filed an internal complaint against that decision with the Director General. It was not submitted to the Joint Committee for Disputes and therefore received no reply so, according to Article 92(2) of the Staff Regulations, it was rejected by an implied decision.

The successful candidate, Mr R., took up his duties on 1 December 1999.

On 21 January 2000 the complainant put the matter to the Tribunal, requesting the quashing of the implied rejection of his internal complaint and the cancellation of Mr R.'s appointment.

In its reply the Agency admits that the procedure was flawed – as in Judgment 1768 (*in re* Bodar) – by its failure to submit the internal complaint to the Joint Committee for Disputes. Consequently, it says, the Director General decided to refer the internal complaint to the Committee so as to avoid an unfavourable judgment and to stop the present proceedings. The Director General would then take an express decision, which may also give rise to a complaint. Eurocontrol agrees to compensate the complainant for moral injury and pay his costs. It asks the Tribunal to record "the decisions taken immediately to remedy the flaw" and its offer to pay compensation for moral injury in an amount of 1,000 euros, and costs. It requests the complainant to "withdraw the present suit".

In his rejoinder the complainant requests the Tribunal to set the amount of the compensation due for moral and material injury and to grant him 150,000 Belgian francs in costs. He points out that the Joint Committee for Disputes has given its opinion and that his internal complaint was rejected by a decision of 8 June 2000. He contests that his complaint should be considered as being directed against the new decision.

2. The Agency must be regarded as having revoked the implied rejection of the internal complaint. The terms of the reply leave no doubt on that score. Moreover, it was as good as its word since it did refer the case to the Joint Committee for Disputes and subsequently took an express decision on it.

The complainant declined to withdraw suit; he appears uncertain about the scope of Judgment 1768, whereby the Tribunal sent the case back to the Director General for the procedure to be taken up at the point at which the flaw occurred. Obviously, the purpose of so resuming the procedure was to re-establish the position in law that then prevailed regarding the challenging of the rejection of the candidature and the appointment of the successful candidate. The pleas put forward in this regard should have been re-examined, given that the procedure had been resumed. However, at that stage, the material decisions challenged, namely the rejection of the complainant's candidature and the appointment of another candidate, had not yet been revoked.

The complaint therefore no longer shows a cause of action insofar as it challenged the implied decision to reject the internal complaint. Nevertheless, the parties admit that a ruling must still be made, in particular as regards the claims to moral and material damages and to costs.

However, the complaint does not touch on the new decision to reject the internal complaint. Nor did the parties agree that the proceedings should do so.

3. The complainant requests redress for injury in connection with his promotion prospects. This is a question to be addressed, if necessary, in the context of the new decision. For the rest, the complainant does not show that he suffered any injury other than that arising from the present proceedings.

The procedural flaw and the inconvenience it caused affected his personal interests. In this connection Eurocontrol concedes that it must pay compensation for moral injury and proposes an amount of 1,000 euros. The complainant considers this insufficient. The Agency's decision and the present judgment give the complainant satisfaction and redress the injury in part. Compensation of 1,000 euros therefore appears fair.

4. The complainant's principal plea succeeds. He is accordingly entitled to costs, which the Tribunal sets at 1,000 euros.

## DECISION

For the above reasons,

1. The Tribunal records that the complaint, insofar as it seeks the quashing of decisions, shows no cause of action.
2. The Agency shall pay the complainant 1,000 euros in moral damages.
3. It shall pay the complainant 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

*Organisation internationale du Travail*
*Tribunal administratif*

*International Labour Organization*
*Administrative Tribunal*

# NINETIETH SESSION

***In re* Donaldson**

**Judgment No. 2006**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr John Donaldson against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 4 January 2000 and corrected on 13 April, UNESCO's reply of 30 May, the complainant's rejoinder of 27 July, and the Organization's surrejoinder of 13 October 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an American national born in 1950, joined UNESCO in 1977 as an Assistant Legal Officer at grade P.1 in the Office of International Standards and Legal Affairs (LA). On 1 July 1994 he became a Legal Officer at grade P.4.

On 16 July 1996 the Director-General announced the reorganisation of LA with effect from 1 July 1996. One of the changes was the creation of a Division of General Legal Affairs (LA/GEN). With the authorisation of the Director-General, on 25 July the Director of LA appointed the complainant as Chief of LA/GEN. The complainant was officially assigned the duties corresponding to the new post description and the Director of LA requested the Bureau of Personnel to take the administrative measures necessary to reclassify his post.

On 5 August 1997 the Director of the Bureau of Personnel informed the complainant that his post had been reclassified at grade P.5 with effect from 17 July 1997, and that he would be eligible for promotion on 17 January 1998 if he fulfilled the conditions stipulated in Administrative Circular No. 1240 (II) of 28 August 1981. Under the terms of that circular the complainant would need to have completed five years in the same grade (P.4) and six months of satisfactory service in the post after the reclassification date. Since he had already been carrying out the duties of the post for one year, the complainant discussed the matter of his promotion with the Director of LA. On 21 August 1997 the Director wrote to the Director-General asking him to make an exception in the complainant's case to the five-year seniority period and to promote him as from 1 January 1997, that is to say, six months after the creation of the new Division and the post of Chief of that Division. On 5 February 1998 the Director of Personnel informed the Director of LA that the Director-General had refused the request, but that, in accordance with the circular, the complainant would be granted a special post allowance from 17 January 1998, i.e. six months after the date of the upgrading of his post to grade P.5.

On 1 April 1998 Administrative Circular No. 2052 announced that the five-year period in the same grade had been reduced to six months. Accordingly, on 6 April a personnel officer sent the complainant notification of his promotion to grade P.5 as of 1 April, the date on which Circular No. 2052 took effect.

On 30 April 1998 the complainant appealed against this decision and on 30 June 1999 the Appeals Board submitted its report to the Director-General. It recommended awarding the complainant retroactive compensation for the difference in salary between grades P.4 and P.5. On 6 October 1999 the Director-General informed the complainant that he rejected the appeal. That is the impugned decision.

B. The complainant contends that there was a long administrative delay in processing his post description and reclassifying his post, but that nonetheless he had been performing P.5-level duties since July 1996. He makes five pleas. First, the decision to make 1 April 1998 the effective date of his promotion is arbitrary. The date has no relationship to the date on which he was assigned the duties corresponding to grade P.5.

Secondly, the decision is discriminatory and constitutes unequal treatment. The complainant submits that some staff members have received promotions resulting from the reclassification of posts without completing the five-year requirement, whereas he was not granted the pay and benefits of grade P.5 until nearly two years after being assigned duties at that level.

Thirdly, the general principle of "equal pay for equal work" has been violated because he has been working at the P.5 level since 25 July 1996 without being paid accordingly. Furthermore, the Administration has recognised that the five-year requirement violated this principle, which is why they have since abolished that requirement.

Fourthly, the decision violates the general principle of law against unjust enrichment. The Organization has benefited by requiring him to work at the P.5 level while paying him a salary at the P.4 level. He claims that, except for less than three months in early 1998, he did not even receive a special post allowance.

Fifthly, he argues that the Tribunal's case law supports his claim that his promotion should be retroactive to the date on which he officially assumed his new duties.

He requests the Tribunal to: (1) find that 1 April 1998 "was not an appropriate and lawful date" for his promotion to grade P.5; (2) quash the decision concerning the date of his promotion; (3) order the Organization to "reconstitute" his career with effect from 25 July 1996 – the date he was officially assigned duties at grade P.5; (4) order the Organization to pay an appropriate rate of interest on the sums due as a result of the retroactive promotion; (5) order the Organization to reimburse him for any taxes, plus interest, late fees, and penalties that he may be required to pay to the French authorities and which he would not have been required to pay had he been promoted on 25 July 1996; and (6) award any other relief that the Tribunal deems appropriate.

C. In its reply UNESCO objects to the receivability of the complaint inasmuch as it impugns any decisions prior to 6 April 1998 regarding his promotion. The complainant did not challenge before the Appeals Board the decision of 5 August 1997 which initially set his promotion date. Therefore the remedy sought by the complainant is time-barred. The intervention by the Director of LA did not forestall the time limits allowed for filing his appeal.

The choice of date for his promotion was not arbitrary: it was the date on which the applicable rules changed. There were no delays in processing the complainant's new post description, and all the applicable rules were followed. Additionally, UNESCO submits that the complainant has relied on case law that is not applicable to the present case.

There is no "right" to promotion. Promotion is a matter that falls within the discretionary authority of the Director-General. Therefore, the complainant's grade remained unchanged until the Director-General agreed to promote him; promotion does not have to be effective from the date on which the duties are assigned.

There has been no breach of equal treatment as the individuals referred to by the complainant are in different positions in fact and in law.

Finally, there was no unjust enrichment. The complainant was awarded a special post allowance with effect from 17 January 1998.

D. In his rejoinder the complainant refutes UNESCO's argument that his claims are irreceivable. First, the decision of 5 August 1997 was not a final decision and the Director of LA had offered to resolve the issue with the Director-General. So, the complainant acted in good faith by waiting for the Director-General's final decision before filing an appeal.

Secondly, the decision of 6 April 1998 superseded the decision of 5 August 1997. Therefore the Organization errs when it argues that he should have contested the first decision, as only the second decision remains subject to challenge.

He notes that UNESCO did not deny in its reply that the Appeals Board found his appeal receivable and recommended that he be awarded retroactive compensation.

E. In its surrejoinder the Organization presses its objections to receivability. Regarding the complainant's comments concerning the Appeals Board, it notes that the Board consists of staff members who do not necessarily have a legal background; in addition, the Tribunal is not bound by the recommendations of the Board. On the other issues it presses the pleas in its reply.

## CONSIDERATIONS

1. The complainant joined UNESCO in 1977 as Assistant Legal Officer at grade P.1 in the Office of International Standards and Legal Affairs (LA). After periodic promotions during his career he was eventually promoted on 1 July 1994 to grade P.4.

Pursuant to a reorganisation of LA, the complainant was appointed as Chief of the Division of General Legal Affairs, one of the three newly created sections, on 25 July 1996, and was assigned duties corresponding to his new post description.

2. Following a desk audit of his post, the complainant was informed by the Director of the Bureau of Personnel on 5 August 1997 that the Director-General had decided to upgrade his post from P.4 to P.5 with effect from 17 July 1997 and that he would be eligible for promotion on 17 January 1998 if he satisfied the requirement of five years of seniority in the same grade contained in Administrative Circular No. 1240 (II) of 28 August 1981. Moreover, he should have completed six months of satisfactory service in the reclassified post.

3. The complainant apparently acquiesced to this decision, inasmuch as he filed no appeal against it within the time limit provided in the Statutes of the Appeals Board, paragraph 7(a) of which states:

> "A staff member who wishes to contest any administrative decision or disciplinary action shall first protest against it in writing. The protest shall be addressed to the Director-General through the Director of the Bureau of Personnel, within a period of one month of the date of receipt of the decision or of the action contested by the staff member if he is stationed at Headquarters ..."

4. Since the complainant lacked the required five years of seniority in his grade, the then Director of LA recommended in a memorandum dated 21 August 1997 to the Director-General that he should make an exception in the complainant's favour by making his promotion retroactive to 1 January 1997, that is six months after the date on which the Office had been reorganised.

However, in a memorandum of 5 February 1998 the Director of Personnel affirmed that the Director-General had decided to apply the provisions of the above-mentioned circular to the complainant in respect of the five-year period, but that, in accordance with the same circular, he would receive a special post allowance at grade P.5 with effect from 17 January 1998, that is six months after the date of the upgrading of his post to grade P.5.

5. Subsequently, in the interests of all staff members, the Director-General decided to abolish the condition of five years of seniority in the grade. Hence, the complainant was informed by a memorandum of 6 April 1998 that his promotion to grade P.5 would take effect from 1 April 1998.

6. The complainant filed a protest against this decision with the Director-General on 30 April 1998 claiming that his promotion to grade P.5 should be made retroactive to 25 July 1996. On 30 June 1999 the Appeals Board submitted a report to the Director-General recommending that retroactive compensation be made by paying the complainant the difference in salary between his former and his new grade.

7. On 6 October 1999 the Director-General informed the complainant that he had "decided to dismiss the appeal for the reasons mentioned in the Administration's detailed reply to [his] appeal". In his complaint lodged with the Tribunal on 4 January 2000, the complainant impugns that decision.

8. The complainant asks the Tribunal to make a finding that the date of 1 April 1998 "was not an appropriate and lawful date on which to make effective [his] promotion to P.5" and, therefore, to quash the decision concerning the date of his promotion, to order the Administration to make his promotion retroactive to 25 July 1996 and to pay him whatever amounts are due to him as a result of his assuming duties at the P.5 level as from the same date.

*On the arbitrariness of the date of promotion*

9. The complainant alleges that the date fixed for his promotion – 1 April 1998 – was arbitrary. Instead, it should have been 25 July 1996 which is when he assumed the duties of his new post as Chief of the Division of General Legal Affairs.

10. The date – 1 April 1998 – was the date of the publication of Circular No. 2052 which abolished the requirement of five years' seniority in the same grade. Moreover, it informed staff members of the promotion, with immediate effect, of all those whose posts had been reclassified more than six months earlier and who, not having the necessary number of years of seniority in the grade, had been receiving a special post allowance. This applied also to the complainant as he belonged to this category. However, to give retroactive effect to this circular would not be possible since "According to customary methods of interpretation any action prescribed in a text is deemed to be of immediate effect. There is no presumption of retroactive effect". (Judgment 742, *in re* Francese and Guastavi). Indeed, there can be no retroactive application of the rights sought by the

complainant, and his status results only from the publication of the circular in question. The charge of arbitrariness would be tenable if there were no basis for applying the circular to the case of the complainant, but, as shown above, the scope of the text explicitly covered his situation.

Moreover, the promotion, initially scheduled for 17 July 1998, took effect three and a half months earlier, that is on 1 April 1998.

11. The date of promotion of an employee does not depend on his wishes or on what he thinks is his right. It is within the discretion of the administrative authority to adopt rules and determine the policy relating to promotion as well as the time at which a promotion will take place. (Judgments 199, *in re* Lee, 262, *in re* Lamadie, and 263, *in re* Andary.)

12. Hence, even if the employee is of the opinion that he meets the necessary qualifications and statutory conditions for a promotion, it does not follow that he can demand that the Administration grant him the benefits of the promotion from a particular date. As the Tribunal said in Judgment 1207, *in re* Boungou, under 8, "no staff member has any right to promotion".

### *On whether the impugned decision is discriminatory and constitutes unequal treatment*

13. The complainant cites the case of other staff members who received the pay and benefits of the grade as soon as they took up their duties at the P.5 level.

14. What he overlooks is that the staff members he mentions are not in the same position, either in fact or in law. His case is about reclassification of a post and it is a fact that he was treated in the same manner as the Chief of the Division for Administrative Legal Affairs – one of the other new sections in LA – whose post was similarly reclassified from P.4 to P.5. Therefore, the plea fails.

### *On the breach of the principle of equal pay for equal work*

15. The complainant asserts that although he had been performing P.5-level work since 25 July 1996, he did not receive the same job-related benefits as those at grade P.5.

16. The Administration, in an effort to rectify the alleged contradiction between the principles of in-grade seniority and equal pay for equal work, specifically abolished one of the conditions for promotion in a reclassified post, namely, the condition of five years of seniority in the grade.

17. Since the complainant did not meet the requirement of five years of seniority in the grade, the Director-General granted him a special post allowance at grade P.5 with effect from 17 January 1998, that is six months after the date on which his post was upgraded. So, this plea too fails.

### *On the breach of the principle against unjust enrichment*

18. The complainant maintains that the Organization saved on costs by assigning new and higher-level duties to staff members while at the same time refusing or postponing their promotion to the corresponding grade.

19. As stated previously, the point of time at which a promotion is granted is a matter within the discretionary authority of the Director-General.

20. There was no abuse in choosing the date for promoting the complainant since he was not eligible for promotion until 17 July 1998 because of the condition relating to in-grade seniority.

Besides, after the upgrading of the post, a special post allowance was granted to him as from 17 January 1998.

21. As is evident from the foregoing, the complainant's claim to quash the decision concerning the date of his promotion as from 1 April 1998 and make it retroactive to 25 July 1996 has no basis in law and should be dismissed.

22. As the complaint fails on the merits, there is no need to deal with the issue of receivability.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

Flerida Ruth P. Romero

FLERIDA ROMERO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

**Organisation internationale du Travail** **International Labour Organization**
***Tribunal administratif*** ***Administrative Tribunal***

***Registry's translation, the French text alone being authoritative.***

# NINETIETH SESSION

***In re* Diouf** **Judgment No. 2007**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Danièle Diouf against the International Federation of Red Cross and Red Crescent Societies (IFRC hereinafter referred to as the "Federation") on 14 January 2000 and corrected on 22 March, the Federation's reply of 29 May, the complainant's rejoinder of 5 July and the Federation's surrejoinder of 11 August 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Swiss national born in 1947, took up employment at the Federation on 1 May 1985 as a secretary in the Human Resources Department. She was subsequently assigned to a post as administrative assistant in the Refugees and Displaced Persons Department. Her performance appraisal form for the 1993-1994 period showed her work to be generally satisfactory.

In a letter of 27 January 1995 the Director of the Human Resources Department informed the complainant that following restructuring of the Secretariat she was to be assigned to a new post. In a letter of 30 May the acting Director of the same Department told her that the Federation had been unable to find her a new post. Nevertheless, it undertook to maintain her in employment if her services continued to be satisfactory. She was also informed that she would soon be temporarily assigned to the post of secretary to the Head of the Planning Unit. On 23 August the Director wrote to the complainant to tell her that she had been appointed to the post of secretary in the Principles and Policy Unit as of 1 September 1995. Shortly thereafter, her appointment with the Planning Unit was confirmed; she thus split her time at work between the two units. The complainant's performance appraisal report of 18 September 1996 and 30 September 1997 showed that, on the whole, she was carrying out her new duties satisfactorily but that she needed to improve the quality of some aspects of her work. The performance appraisal of 30 September 1998, however, rated her below standard in certain tasks. In particular, she was criticised for inattention to detail, and was consequently advised to be especially attentive to that point and to improve the presentation of her work.

On 25 March 1999 the complainant met with her supervisors and the Recruitment Coordinator from the Department of Human Resources to work out an action plan for improving the quality of her work. On 13 April the Head of the Planning Unit sent her a letter which constituted a "formal warning" and informed her that she had three months in which to improve; otherwise the Federation might transfer her or terminate her contract. The complainant was placed on sick leave from 15 April. On 23 April she wrote to the Recruitment Coordinator to tell her that she wished to "contest the [above-mentioned] warning". In particular, she complained about "a deterioration in the atmosphere at work" that had given rise to "unacceptable tensions" which had destabilised her. The Coordinator replied in a letter of 30 April that there was no procedure for appeal against a warning. In a letter of 10 May, the complainant's doctor authorised her return to work as of 17 May with the proviso "that her working conditions should be improved so as to avoid a relapse".

On 16 August 1999 the Secretary General wrote to the complainant to inform her that due to her unsatisfactory performance her employment would be terminated as from 29 February 2000, that is after a notice period of six months. On 27 August 1999 the complainant appealed to the Joint Appeals Commission against that decision. She indicated her wish to be represented before the Commission by a colleague. By a letter of 26 October 1999 the Co-Chairmen of the Commission informed the complainant that the Commission considered her dismissal warranted and that the Secretary General shared its opinion. That is the impugned decision.

From 17 August 1999 to 14 January 2000 the complainant was on sick leave. In a letter of 7 February 2000 the Director of Human Resources informed her that the notice period had been suspended during her incapacity for work, which meant that it had started to run again on 15 January and would end on 31 July 2000.

B. The complainant contends that the Federation failed to give proper reasons for her dismissal. Its criticisms of her, insofar as they concern "details", are pretexts designed to conceal the wrongful nature of her dismissal. She objects to the way her two direct supervisors behaved towards her and contends that she was placed under "psychological pressure". Indeed, she alleges that her ailments were partly due to the "attacks against her character" by her supervisors, who failed in their duty to respect members of staff and protect their health. She adds that she was not heard by the Joint Appeals Commission.

The complainant claims the quashing of the decisions of 16 August and 26 October 1999 and compensation equal to twelve months' pay. She also asks the Tribunal to request the Federation to supply her with a certificate of employment stating the nature of her duties and the length of her service and reporting on her performance and conduct. She claims costs.

C. In its reply the Federation explains that under a headquarters agreement with the Swiss Federal Council, it has immunity of jurisdiction and execution. The agreement provides that the Federation shall establish a means of resolving disputes; the Federation has accordingly established in its Staff Rules that any disputes with its employees shall be brought before the Tribunal.

The Federation contends that it gave clear reasons for the unfavourable assessment of the complainant. It states that it has examined the complainant's criticisms of her supervisors and that it attempted to help her to improve. But its efforts failed, so the decision to terminate her contract was "valid and appropriate" and in no way wrongful. It denies that the complainant was subjected to any "psychological destabilisation".

The Federation provides two certificates of employment, dated 20 April 2000, one in a full version, the other in a version dealing only with the nature of her duties and the length of her service. It deems that it has thus fulfilled its obligations in this connection. It asks the Tribunal to award it fair compensation for costs.

D. In her rejoinder the complainant specifies that one of the certificates of employment supplied by the Federation contains a comment about her lack of attention to detail which, in her view, should not appear in such a document. She accordingly changes her claim and asks the Tribunal to invite the Federation to draw up a new certificate excluding the above comment.

E. In its surrejoinder the Federation contends that it cannot be required to remove the comment in question. Indeed, since the complainant had requested a "full certificate", she must accept that it contains remarks about the quality of her work. Only a false assessment or one established in bad faith, could be corrected; such was not the case. Besides, if the comment was removed the certificate would no longer reflect the Federation's opinion, which would be unacceptable.

## CONSIDERATIONS

1. The complainant was recruited by the Federation on 1 May 1985 as a secretary in the Human Resources Department.

From 1992 to 1995 she worked as an administrative assistant in the Refugees and Displaced Persons Department. That post having been abolished as a result of restructuring, on 23 August 1995 she was appointed secretary in the Principles and Policy Unit as from 1 September 1995. Shortly after she was also appointed to the Planning Unit, which meant that she had two first-level supervisors.

Her 1995 professional assessment earned her a performance-related bonus and she was thanked for her efforts.

Her performance appraisal form of 30 September 1998 said that she fulfilled the requirements of her post in some but not all areas. In particular, she was criticised for having made some unfortunate mistakes. She was asked to pay more attention to such details as names, addresses and contact numbers and to the presentation of her work over the following three months.

On 25 March 1999, at a meeting with her two supervisors and the Recruitment Coordinator from the Department of Human Resources, a number of criticisms were levelled at the complainant. The note drafted at the end of the meeting said that she was to be given a written warning. She was also to meet daily with her immediate supervisors to establish priorities and objectives as part of an "action plan" for improvement.

She subsequently had numerous meetings with the Recruitment Coordinator with a view to improving her performance.

On 13 April 1999 the complainant received a formal warning that she must improve within three months, otherwise the Federation might transfer her to another post or terminate her contract. She also received the action plan to help her to improve. On 15 April 1999, however, her doctor ordered her to stop working on medical grounds.

On 23 April 1999 the complainant sent a letter to the Recruitment Coordinator saying that she wished to "contest the warning ... of 13 April". She referred among other matters to "the poor relations in the group to which [she] belong[ed] which [had] led to a deterioration in the atmosphere at work resulting in unacceptable tensions which [had] destabilised [her] ... In [her] opinion, responsibility for this situation [was] shared by the members of the team, which [was] why [she would] not sign this warning".

The Recruitment Coordinator replied, agreeing that it was the responsibility of all parties to promote healthy and cooperative working relations.

The complainant returned to work on 17 May 1999 on the authorisation of her doctor, who indicated "that her working conditions should be improved so as to avoid a relapse".

On 15 July 1999 she was summoned to the Human Resources Department where she was informed of various criticisms of her by her immediate supervisors. At that meeting she was again told that if any other errors of the type noted by her supervisors were made before the end of August, her contract would be terminated.

On 19 July 1999 the complainant went to see the Director of the Human Resources Department to inform her that the situation was becoming unbearable, but that she did not wish to leave the Federation.

The complainant took annual leave from 26 July to 9 August 1999.

On 16 August 1999 she received a letter dismissing her as from 29 February 2000 and informing her that she was relieved of her duties with immediate effect. Since she was subsequently unable to work due to illness, the period of notice was suspended and the date of its expiry was extended to 31 July 2000.

2. On 27 August 1999 the complainant appealed to the Joint Appeals Commission against the decision of 16 August 1999. She asked the Commission to recommend that the Secretary General quash the decision and that she be reinstated in a post that matched the abilities she had demonstrated over fourteen years of service, in conformity with Article 1020.2 of the Staff Regulations. She also asked to be assisted during the procedure by an employee of the Federation.

In a letter of 26 October 1999, the Joint Appeals Commission informed the complainant that it had recommended that the Secretary General confirm his decision of 16 August to dismiss her and that he had followed its recommendation.

That is the decision she is challenging in the present complaint, filed on 14 January 2000.

3. The complainant asks the Tribunal:

- to quash the Joint Appeals Commission's decision of 26 October 1999 and, consequently, the Secretary General's decision of 16 August 1999;
- to order the Federation to pay her compensation equal to twelve months' wages;
- to ask the Federation to supply her with a certificate of employment stating the nature of her duties and the length of her service and reporting on her performance and conduct; and
- to award her costs.

4. In support of her claims, the complainant submits that no reasons were given for the decision of 26 October 1999, and that the decision of 16 August 1999 omits to mention whether the Secretary General explored the possibility of transferring her to a post that matched the abilities she had demonstrated during her fourteen years of service with the Federation.

Citing the Staff Regulations, she asserts that employment may be terminated for unsatisfactory performance only after the employee concerned has received a formal written warning allowing three months for improvement. In her view, the 1998 assessment did not constitute a warning within the meaning of Article 1020.1 of the Staff Regulations; however, the letter of 13 April 1999 did, even if it referred mistakenly to Article 1030.1 instead of Article 1020.1 of the Staff Regulations.

However, the complainant points out that the period of three months coincided with a period during which she suffered from serious health problems, as shown by the medical certificate noting an incapacity for work as of 16 April. Moreover, when he allowed her to start work again, her doctor saw fit to specify that her employer should pay particular attention to her working conditions in order to avoid a relapse. So rather than leaving her to the mercy of her two immediate supervisors, whose treatment of her caused her psychological suffering amounting to an unlawful attack against her character, the Federation ought at least to have taken account of her incapacity for work and state of health and prolonged the "probationary" period proportionately. It should not have summoned her as soon as the period ended – on 15 July 1999 – to inform her of her supervisors' criticisms.

She considers that their criticisms, which focus only on details, are in fact pretexts intended to hide the wrongful nature of the dismissal since, in her view, the Federation has failed to prove that her performance was so poor as to warrant dismissal, especially after fourteen years of satisfactory service.

She concludes from the above that the dismissal notified to her on 16 August 1999 is in breach of the *Staff Regulations*, and that the behaviour of the Federation amounts to an attack against her character.

5. The Federation contends that both the termination of the complainant's contract and the procedure which led to it are consistent with the rules. It stresses that "neither the new formal warning of 13 April 1999 ... nor the subsequent meetings led to an improvement, and so the decision and letter of 16 August 1999 notifying [her] of the termination of her contract for unsatisfactory performance, was both valid and appropriate".

It adds, in particular, that the time limits were respected: after the warning in the appraisal report of October 1998, a new formal warning was addressed to the complainant on 13 April 1999. Furthermore, to take account of her one month's absence on sick leave following the second warning, the Federation of its own accord prolonged the three-month period; it took and notified its decision only on 16 August 1999.

6. The Staff Regulations of the Federation provide that:

Article 1020.1

"If, after formal written warning allowing 3 months for improvement, a staff member still does not do his/her work satisfactorily or does not maintain satisfactory working relations with the rest of the staff, the Secretary General may transfer him/her to another post within the Secretariat or terminate his/her engagement."

Article 1020.2

"If it appears that the reason the staff member's work is unsatisfactory is that the duties and responsibilities of his/her post are too much for him/her, consideration shall be given to transferring him/her to a post suited to the abilities he/she has shown, if such post is available."

### Article 1020.3

"Termination under this regulation shall be subject to 1 month's notice for each year of service (maximum 6 months' notice), to take effect at the end of the appropriate month."

### Article 1020.4

"A contract cannot be terminated for unsatisfactory performance during the period of 3 months following a formal written warning, where 3 months have been provided for improvement."

### Article 1020.5

"Staff members whose appointments are terminated under this regulation shall have a right of appeal (see Art. 1110)."

### Article 1110.1

"Staff members may appeal against a decision to terminate their appointment under Art. 700 (Conduct) or 1030 [*recte* 1020] (Unsatisfactory Performance). Such appeal must be made in writing to the Joint Appeals Commission ..."

### Article 1420.4

"The appellant may ask another staff member of the Secretariat to represent him/her before the Commission. He/she may not be represented by anyone outside the Secretariat."

7. Consistent precedent has it that a decision to terminate a contract being discretionary, the Tribunal will quash it only if it shows a mistake of fact or of law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority or lack of authority by the person taking the decision.

8. Under the provisions quoted above, a contract may be terminated for unsatisfactory performance only after the employee has been served with a formal written warning allowing him or her three months to improve.

That period – which essentially aims at allowing the employee concerned enough time as may be constructively used to correct mistakes, make good shortcomings and improve both behaviour and working relations with other staff members – must cover an effective period of three months during which the employee must be in a position to perform his or her duties correctly and to make full use of his or her abilities.

The Tribunal considers that in this instance the complainant was not in such a position. She was placed on sick leave as from 15 April 1999, that is two days after having received the warning imposing probationary notice of three months. She was authorised to resume her duties fully only as from 17 May 1999, her doctor indicating that it was important "that her working conditions should be improved so as to avoid a relapse". She then took annual leave from 26 July to 9 August 1999.

Obviously, therefore, the complainant was not in a position to improve her performance during the period from 15 April to 17 May 1999, nor during her period of annual leave. That being so, on 16 August 1999 when the decision to dismiss her which refers to the warning of 13 April 1999 was notified, she had not completed the three months of actual service during which she might have shown improvement.

The Tribunal consequently considers that the decision to dismiss her is not in conformity with the material provisions.

9. Moreover, the warning letter of 13 April 1999 stated clearly that unless the quality of her work improved within three months, a decision could be taken to transfer her to another post or terminate her contract.

In the letter addressed to the complainant on 16 August 1999, there is no longer any question of a transfer. And there is nothing in the dossier indicating whether the Federation tried to find her another suitable post as Article 1020.2 of the Staff Regulations requires and as it should have done in view of the fact that she had been on the staff since 1985. She had never received an unfavourable appraisal until September 1998, that is after thirteen years of service and three years after the restructuring exercise which had abolished the post of administrative assistant that she had held to the satisfaction of the Federation.

The testimonials produced by the complainant, the contents of which are not contested by the Federation, suggest that transfer to another post might have been a better solution and more in line with the duties that an international organisation has towards its employees.

10. The Tribunal also notes that the complainant asked to be represented before the Joint Appeals Commission by an employee of the

Federation as Article 1420.4 of the Staff Regulations allows. But no effect was given to this request and no explanation was supplied to the complainant.

11. The conclusion is that the decision to dismiss the complainant was not in conformity with the provisions of the Staff Regulations, and that the Federation was in breach of its duty to treat its employees with respect and dignity and to avoid causing them unnecessary injury.

12. The complainant believes that reinstatement is not possible and asks for twelve months' pay in compensation for material and moral injury. The Tribunal considers that, in view of the circumstances of the case, the compensation which she may rightly claim in redress for all the injury she has suffered should be set at 40,000 Swiss francs.

13. The complainant has requested a certificate of employment stating the nature of her duties and the length of her service as well as the quality of her performance and conduct.

In a letter addressed to the Registrar of the Tribunal on 5 July 2000, she states that the Federation finally established a certificate of employment for her, but that it contains a comment which should not be there. She asks for its deletion.

The Tribunal sees no reason to allow that request, since the certificate of employment has been established in conformity with the provisions of Article 1090 of the Staff Regulations. Moreover, the complainant has produced no evidence to show that the certificate was based on wrong facts.

14. There is no reason to order the hearings requested by the complainant.

15. The complainant is entitled to costs, and the amount is set at 4,000 Swiss francs.

## DECISION

**For the above reasons,**

1. **The impugned decision is set aside.**
2. **The Federation shall pay the complainant 40,000 Swiss francs in compensation for injury under all heads.**
3. **It shall pay the complainant 4,000 francs in costs.**
4. **All other claims are dismissed.**

**In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

*(Signed)*

**MICHEL GENTOT** **JEAN-FRANÇOIS EGLI** **SEYDOU BA**

**CATHERINE COMTET**

*Registry's translation,*
*the French text alone*
*being authoritative.*

# NINETIETH SESSION

***In re* Filthuth** **Judgment No. 2008**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Heinz Filthuth against the European Organization for Nuclear Research (CERN) on 22 December 1999, CERN's reply of 10 April 2000, the complainant's rejoinder of 6 June and the Organization's surrejoinder of 25 September 2000;

Considering Articles II, paragraphs 5, 6 and 7, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a physicist of German nationality born in 1925, was a member of CERN's permanent staff from 15 February 1955 to 29 February 1964. As such, he had compulsory health insurance and cover for his family with the Organization's own insurance scheme. The scheme was governed by a Health Insurance Agreement between CERN and the *Caisse maladie suisse d'entreprises* until 31 December 1970. Since then, it has been governed by another agreement which CERN concluded with the insurance company "Austria".

As from 1 March 1964, the complainant was employed by the University of Heidelberg (Germany) as physics teacher. CERN then appointed him as a "consultant" with the status of "visitor", a category of non-permanent staff, on a yearly contract which was renewed several times. Since CERN's health insurance scheme allows "visitors" to subscribe on a voluntary basis, the complainant chose to remain in the scheme for the duration of his appointment as a consultant.

His last contract ended on 28 February 1973. By letters of 27 February and 2 April 1973, CERN told him that he could remain in its health insurance scheme on a voluntary basis for one year at most, as was allowed under Article 22.1 of the Health Insurance Agreement which says:

> "Where a person provided for under paragraph A of Annex I to the present agreement ceases to be employed at CERN for any reason, without being entitled to become a beneficiary under the terms of paragraph B of the said Annex, the Insurers shall continue to insure him or her and/or the members of his or her family for a further period of twelve months according to the conditions governing premiums and benefits set out in the present agreement, provided that the insured person and/or the beneficiaries so request."

Notwithstanding the terms of the above article, the affiliation of the complainant and his family was maintained tacitly beyond the stipulated period.

The complainant divorced in 1979 and then remarried. He had a daughter on 14 March 1979.

By a letter of 22 June 1983 Austria sent the complainant a proposal for coverage by its Swiss subsidiary and asked him to take out a new policy. Following a similar request from Austria in 1991, the complainant took the matter up with CERN. On 15 April 1991, the senior administrative officer in charge of health insurance sent him a copy of a letter of the same date which he had written to Austria. It said that in view of the complainant's age and the fact that his membership of the scheme had been maintained tacitly for more than ten years, CERN's health insurance would continue to cover him and his family. In his covering letter to the complainant, the administrative officer asked him to seek health coverage under the social security system of his country of residence, which was Germany.

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*Registry's translation

On 27 November 1994 the complainant wrote to Austria asking it to cancel his policy as from 1 December, but changed his mind on 25 January 1995.

By a letter of 11 August 1997 the Director of Austria told him that as from 31 December 1997 he and his family could no longer be covered by the CERN scheme. In a letter of 21 November 1997 the complainant informed Austria that because of his age he could not have health coverage under the German social security scheme. By a letter of 30 June 1998 CERN's Director of Administration allowed him to remain in the Organization's scheme but excluded the members of his family as from 1 July 1999, on the grounds that they were eligible for cover under the German scheme. The complainant protested against that decision in a letter of 20 July 1998, but the Director of Administration upheld it on 5 October and on 31 May 1999 reiterated CERN's position in a letter to the complainant's counsel.

By a letter of 28 July 1999 the complainant appealed against CERN's decision to exclude his family from its health insurance scheme. On the same date he applied to the Director of Austria for arbitration under Article 12.1.2 of the Health Insurance Agreement. By a letter of 21 September Austria sent him a proposal for a different health insurance contract. By a letter of 24 September 1999, the impugned decision, CERN rejected his appeal as irreceivable *ratione personae* pursuant to Article R VI 1.06 d) of the Staff Regulations, and subsidiarily as devoid of merit.

B. The complainant submits that his complaint is receivable because he does have *locus standi*. Citing the case law he explains that the right he is seeking to assert arises from his status as a former staff member of CERN. Furthermore, if he had no link with CERN, how could it apply its rules to him and take a decision that affected him adversely? Even if CERN could apply its rules to someone outside the Organization, due process would require it to extend to that person the same means of redress as the rules afford to staff.

The complaint is also receivable because it was filed within the time limit: it challenges the decision of 30 June 1998, which became final on

24 September 1999; it was thus filed within the ninety days laid down in Article VII(2) of the Tribunal's Statute.

The complainant has three pleas on the merits. The first is breach of the principle of proportionality. CERN's exclusion of the members of the complainant's family from its insurance scheme caused the complainant serious injury without producing any significant benefit for the Organization. Secondly, there was breach of the principle of legality. The complainant being insured under the Agreement, his family has cover *ipso facto* pursuant to its Annex I(B) and so cannot be excluded lawfully for as long as he is insured. Besides, the Agreement makes no provision for exclusion. Thirdly, CERN breached the principle of good faith: by maintaining the complainant (and hence his family) tacitly in its insurance scheme for twenty-seven years, it created legitimate expectations that the situation would last.

He asks the Tribunal to quash the impugned decision; confirm that the membership of his wife and daughter in CERN's health insurance scheme is maintained; order the reimbursement, pursuant to the conditions set in the Agreement, of the medical expenses incurred by his wife and daughter since 1 July 1999, plus interest at the rate of 5 per cent a year between the date that payment is made and the date of this judgment; and award him moral damages and costs.

C. In its reply CERN submits that the complaint is irreceivable.

First, it is irreceivable *ratione materiae*. Although a former official may lodge a complaint with the Tribunal, it will be receivable only if he is alleging some right arising under his former appointment. The right the complainant asserts, however, does not derive from CERN's staff rules, but is inferred from an ad hoc arrangement authorised exceptionally by the Organization in its letter to him of 15 April 1991. Claims relating to any rights which may derive from an informal arrangement of this sort are not within the Tribunal's competence.

The complaint is also irreceivable *ratione temporis*. Not being a CERN staff member, the complainant was barred from filing an internal appeal under Articles VI 1.01 and R VI 1.06 of the Staff Rules and Regulations. He should have taken his case directly to the Tribunal within ninety days after the decision of 30 June 1998 was notified to him. The letters he received subsequently do not constitute new decisions giving rise to any new time limits. CERN also points out that he went to the Tribunal without responding to Austria's insurance proposal of 21 September 1999.

CERN adds that the case law the complainant cites to illustrate the Tribunal's interpretation of what constitutes a staff member relates not to the Organization's own rules defining the persons covered by its internal appeal procedures, but to the rules on the receivability of complaints to the Tribunal.

In subsidiary pleas CERN submits that the complaint is unfounded. According to Article 22.1 of the Agreement, a staff member who leaves the Organization may, upon request, retain membership of the CERN health insurance scheme for twelve months at most. Recounting the circumstances of its non-renewal of his contract as consultant, CERN explains that while he did remain in the scheme beyond the statutory limit, it was as a result not of some entitlement conferred on him by CERN rules but of an arrangement made by the Organization "*ex gratia*" because he was facing personal difficulties. That arrangement, of which the complainant was informed in the letter of 15 April 1991, was not granted unconditionally, and especially not indefinitely. Furthermore, the fact that CERN allowed him to remain in its health insurance scheme did not imply that it also had to cover the members of his family, who can and should join another scheme in their own interests.

D. In his rejoinder the complainant objects to CERN's reference to "events dating back more than twenty-five years which are in no way relevant to this case, in an attempt to discredit him in the eyes of the Tribunal". He asks to have the reference eliminated: it is quite superfluous since, as CERN acknowledges, his membership of the insurance scheme for a year after the end of his contract was perfectly in keeping with Article 22.1 of the Agreement.

He submits that, while his wife may fulfill the formal requirements for joining a private insurance scheme, in view of her age (fifty-seven) and medical records, such insurance would secure her little protection: premiums would be high and she would be subject to numerous medical reservations. He adds that Austria's proposal of 21 September 1999 was unacceptable because it infringed Swiss law.

E. In its surrejoinder CERN explains that it referred to certain events in the complainant's past so that the Tribunal would understand the unusual circumstances in which it kept him on in its insurance scheme beyond the statutory period, and realise the extent of its good will.

CERN maintains that the complainant's wife does meet the requirements for private health coverage in Germany and asserts that Austria's insurance proposal was perfectly lawful and contains no medical reservations. What is more, Austria informed CERN that on 19 September 2000 the complainant stated his intention of accepting an insurance offer for himself and his family with retroactive effect from 1 July 1999.

## CONSIDERATIONS

1. From 15 February 1955 to 29 February 1964 the complainant was an established member of the CERN staff and as such was affiliated, together with his family, to the Organization's health insurance scheme, which at the time was managed by the *Caisse maladie suisse d'entreprises*. Thereafter, he was employed on consultancy contracts until February 1973 and was thus able to remain in the CERN scheme, which was administered by the insurance company Austria as from 1 January 1971. Owing to circumstances which are immaterial to this case, his appointment as a consultant was not renewed. Upon expiry of his last contract, he and his family were allowed to remain for one year in the scheme managed by Austria, that is until the end of February 1974. Thereafter his membership of the scheme was maintained tacitly and from time to time he was reminded that he should seek health coverage elsewhere. Finally, on 11 August 1997 Austria told him that his eligibility for membership of CERN's health insurance scheme had lapsed years ago and that his cover would end as from 31 December 1997. The complainant pointed out that because of his age he could not be accepted by the health insurance system of his country of residence, Germany, and on 21 November 1997 asked Austria to reconsider his case. Austria forwarded his request to CERN. By

a letter of 30 June 1998 CERN's Director of Administration told the complainant that, in view of the circumstances, his membership of the Organization's insurance scheme would be maintained but that cover for the members of his family would end on 1 July 1999.

2. On 20 July 1998 the complainant asked the Director of Administration to reconsider his decision insofar as it affected him adversely, but his request was rejected on 5 October 1998. He then engaged the services of a lawyer, who wrote to CERN on 11 March 1999 enquiring whether it would continue to cover the complainant's family, but the Organization wrote back on 31 May 1999 upholding its refusal.

3. On 28 July 1999 the complainant filed "an appeal under Chapter VI of the CERN Staff Rules and Regulations against the decision ... of 30 June 1998 ... upheld by [the] letter ... of 5 October 1998 ... supplemented by the further explanation sent in [the] letter ... of 31 May 1999 to [his] counsel, insofar as it excludes the members of [his] family from insurance cover for the risk of accident/sickness under the Health Insurance Agreement ... concluded by CERN and AUSTRIA". The Organization rejected the appeal on 24 September as irreceivable under Article R VI 1.06 d) of the Staff Regulations and, subsidiarily, as devoid of merit. That is the decision challenged before the Tribunal in a complaint registered on 22 December 1999.

4. CERN submits that the Tribunal is not competent to entertain the complaint because, having left CERN many years ago the complainant is not in a position to assert any statutory or contractual rights: he benefited from a special extra-statutory arrangement made *ex gratia* and may not assert for his family any right arising under the terms of his appointment. The objection to the Tribunal's jurisdiction fails: CERN allowed its former employee to retain coverage by a health insurance scheme which he had originally been able to join only because of his employment relationship with the Organization. Whether the continued protection he was granted – albeit *ex gratia* – may also be extended to his family can be determined only by ascertaining his rights as a former employee of the Organization.

5. The receivability of the complaint is seriously in doubt because the internal appeal was filed more than a year after the notification of the decision of 30 June 1998, which the later decisions merely confirmed. However, the Tribunal need not rule on the Organization's objection to receivability, since the complaint fails on the merits. The complainant's only argument is that the impugned decision caused him injury far in excess of the benefit it brought to CERN, and breached the principle of good faith as well as the guarantees afforded him by the Agreement between CERN and Austria. But the evidence shows that he had ceased to be eligible for membership of the CERN health insurance scheme years before, and that although the Organization allowed him *ex gratia* to remain in the scheme, it nonetheless asked him several times to put his position right by joining a sickness insurance scheme in Germany or, if he was unable to obtain coverage for himself, at least to insure his wife and daughter. He relies on the letter of 15 April 1991 informing him that insurance cover for himself and his family would be maintained. But that letter cannot in good faith be construed as establishing the benefit indefinitely. There was no breach of the Agreement between Austria and CERN, because the complainant himself was not entitled to prolongation of the benefits deriving from his membership. Far from disregarding the principles of good faith, legitimate expectations and trust which an organisation must observe in its relations with its staff, CERN more than once showed solicitude towards the complainant's situation and that of his family by giving him appropriate advice and agreeing to maintain him in its scheme.

6. The conclusion is that the complainant's pleas must fail. Moreover, the Tribunal sees no reason to allow his claim to the removal from the file of certain facts which are of no relevance to the case. Although they are irrelevant to determining whether the complainant's arguments are legally sound, CERN was right to bring them to the attention of the Tribunal in order to make matters clear, and they will remain on file as confidential.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT SEYDOU BA HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

# NINETIETH SESSION

***In re* Makinwa** **Judgment No. 2009**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the complaint filed by Mr Alexander Oladosu Makinwa against the International Atomic Energy Agency (IAEA) on 6 December 1999 and corrected on 3 January 2000, the IAEA's reply of 10 March, the complainant's rejoinder of 14 April, and the Agency's surrejoinder of 25 May 2000;**

**Considering Article II, paragraph 5, of the Statute of the Tribunal;**

**Having examined the written submissions and disallowed the complainant's application for oral hearings;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, a Nigerian national born in 1951, joined the IAEA on 10 August 1981 on a fixed-term contract at grade G.3 as a library clerk in the Division of Scientific and Technical Information. His current contract for a post at grade G.5 expires on 31 August 2004.**

**At the material time the complainant was paying maintenance for a son born in 1979 who was not living with him. On 5 March 1996 the complainant filed an application with the Floridsdorf District Court of Vienna requesting a reduction in the amount he had to pay. In support of his application he explained that the maintenance payments caused him financial strain and stated, in a Protocol recorded by the Court, that it was**

necessary for him to pay for fees and travel to attend a university course in England on the European legal system, or he would lose his job. He also stated that he could provide a written statement from his employer confirming this fact.

On 17 April the District Court wrote to the IAEA to ask whether the course was absolutely necessary for the complainant's professional activities, whether it was for private purposes, and whether he would lose his job if he did not take the course. On 11 July the Agency received a similar inquiry from the Federal Ministry of Foreign Affairs of Austria. As a result of these inquiries, on 30 August the Director of the Division of Personnel launched an investigation and on 13 September the Head of the Vienna International Centre Library informed the Director that the university course was a private matter, that there was no connection between the course and the complainant's present position, and that no one had indicated to the complainant that he should take the course. In an internal memorandum of 29 November the Director of Personnel informed the complainant that his false statements to the Court had brought discredit on the Agency and he reminded the complainant of the standard of conduct applicable to international civil servants. On 4 December 1996 the Agency replied to the Court via the Ministry that the course undertaken by the complainant was not required for his work at the IAEA, that he would not lose his job if he did not take it, and that the IAEA was not paying for it.

On 1 October 1997 the Agency received a new inquiry from the District Court via the Ministry. This time it referred to a performance appraisal report submitted to the Court by the complainant which stated that the course he was pursuing was a requirement for his job. This report, dated 17 September 1995, gave the name of the complainant's supervisor as Mr P. Since a copy of the report was not in his file, the Head of the In-Service Administration Unit requested on 20 November 1997 a copy from the complainant, noting at the same time that the supervisor named in the appraisal report had left the Agency in early 1994. On 25 November 1997 the complainant replied that he was "not aware" of the report in question. The Agency responded to the Court via the Ministry on 27 January 1998 that the performance appraisal report in question was "incorrect and ... not an authentic Agency document". On 19 February the

Head of the Staff Administration Section interviewed the complainant who denied falsifying a performance appraisal report. However, he admitted to submitting a report that he considered to be his own personal evaluation of his work performance.

On 5 March the Director of Personnel asked the Office of Internal Audit and Evaluation Support (hereinafter IA) to investigate whether there had been any infringement of the IAEA rules or procedures. The Head of IA submitted a report to the Director of Personnel on 24 July. The report concluded that the complainant had submitted false statements and a falsified document to the Court, that he had not been truthful in responding to the Agency's questions, nor had he attempted to correct his false statements. The Acting Director of Personnel sent this report to the complainant on 6 August 1998 asking for comments. The complainant responded on the same day admitting that he had "made a mistake by sending a wrong document (performance appraisal form) to the court, it was an error of oversight".

On 26 May 1999 the Director of Personnel referred the case to the Deputy Director General for Administration for a decision pursuant to paragraph 4 of Appendix E of Part II, Section 1, of the Administrative Manual. The latter, in turn, referred the matter to the Joint Disciplinary Board whose Alternate Secretary informed the complainant on 25 June of the Board's composition and of his right to be heard. The complainant acknowledged receipt of this information the same day and stated that he did not object to the membership of the Board. He was heard by the Board on 7 July.

On 24 August the Board submitted its report to the Director General. It recommended that the complainant be suspended for two weeks without pay. On 25 November the Acting Director of Personnel informed the complainant that the Director General found a two-week suspension without pay too lenient for the offence committed and had decided instead to suspend the complainant for three months without pay, effective 26 November 1999. That is the impugned decision.

B. The complainant makes four pleas. First, a three-month suspension without pay was unfair, particularly since the Joint Disciplinary Board had recommended only two weeks. He had sent the appraisal report to the District Court by mistake; he thought he had sent his "school registration paper". However, since the appraisal report had been sent back to the IAEA, and not to him, he was unable to correct the error. In addition, the Board did not consider his plea of mistake as a defence; it was biased and influenced by the Administration. Furthermore, it was not just, fair or reasonable for the IAEA to interfere in a private matter that had nothing to do with his contract of employment.

Secondly, he contends that informing him of the suspension so late on the day before it was to take effect was also not fair, just, or reasonable. This gave him such a shock that he had a car accident after leaving the Agency.

Thirdly, the complainant alleges discrimination. He was given additional responsibilities in June 1998 and his supervisor had recommended to the Division of Personnel that his position be upgraded from G.5 to G.6. The refusal to approve the upgrade was motivated by "malice and hatred" on the part of his employer.

Finally, he argues that the Agency is guilty of "malicious defamation". Friends and colleagues who phoned his office were told that he had been suspended. This was private and confidential information that should not have been disclosed to others. He finds fault with the IAEA for cancelling his own and his family's health insurance without notice.

He requests the Tribunal to order the IAEA: to award "general and exemplary damages for the physical and mental pains, defamation and sorrow" caused by the Agency; to repair his car which was damaged in an accident caused by the sudden shock of his suspension; to pay him for the three months he was suspended; to approve upgrading him from grade G.5 to G.6, retroactive to June 1998; and "since [his] reputation is damaged and destroyed" to consider paying his salary until he would have reached retirement at the age of sixty.

C. In its reply the Agency contends that the complainant's suspension was founded on "clear documentary evidence of ... serious misconduct in two instances". In order to substantiate his claim before the District Court for a reduction of maintenance, the complainant intentionally made false statements to it and, in addition, submitted a fabricated document in support of his statement that he would lose his job if he did not attend the course in England. These are very serious acts. Consequently, the Director General was justified in imposing disciplinary measures. Furthermore, in doing so there was no breach of any of the Agency's rules or procedures.

As to his other claims, the complainant only makes allegations but offers no proof. They should accordingly be dismissed.

D. In his rejoinder the complainant contends that he had a right to defend himself against the District Court's decision fixing the amount of his maintenance payment. The IAEA, through the Ministry of Foreign Affairs, had provided the Court with the information that the course was not related to his job and this should have been the end of the matter. It is a fact that he attends the course in England and his actions have not brought the Agency into disrepute. Furthermore, it is necessary for the Agency to have incurred a loss in order to prove his guilt; but they have admitted that they have not incurred any.

He presses his earlier pleas and adds that his "trial" was conducted under "duress of circumstances" since the Agency waited until just before his contract was to be renewed.

E. In its surrejoinder the IAEA reiterates that the complainant made false statements to a court of law. The Director General therefore "had no choice but to decide to impose a credible and severe disciplinary measure". It reasserts that the Agency's rules and procedures were complied with and that there was no bias or unfair treatment towards the complainant during the proceedings.

## CONSIDERATIONS

1. The complainant is a library clerk in the IAEA at grade G.5. At the material time he was paying monthly maintenance for his son who did not reside with him.

In 1996 he filed an application with the Floridsdorf District Court in Vienna to reduce the amount of maintenance. As recorded by the Court, one of the reasons he gave was that he had to attend a university course in England, otherwise he would lose his job.

The complainant also sent to the District Court a performance appraisal report dated 17 September 1995 in which the name given for the complainant's supervisor was that of a person who had ceased to be a staff member on 26 March 1994. The report stated "LL.B. [bachelor of laws] degree required for this job and an advantage for the post". A copy of this report was not found in the complainant's file.

In April and July 1996 the Agency received letters from the District Court and from the Ministry of Foreign Affairs asking whether the complainant would lose his job if he did not attend the course. Following inquiries, the Head of the Library informed the Director of the Division of Personnel that the university course was a private matter; it had no connection with the complainant's position and no one had indicated that he should take it. The Agency informed the Ministry in a letter of 4 December 1996 that the course was not required for the complainant's job, that he would not lose his job if he did not take it and that the Agency was not paying for it. The Ministry was also informed on 27 January 1998 that the performance appraisal report was "incorrect and ... not an authentic Agency document".

During an interview with the Head of the Staff Administration Section on 19 February 1998 the complainant denied falsifying a performance appraisal report. However, he admitted submitting a report which was a personal evaluation of how he was performing in his job but he did not intend it to be seen as an official Agency performance appraisal report.

Following an investigation, the Head of the Office of Internal Audit and Evaluation Support sent a report to the Director of Personnel on 24 July 1998. The complainant was given an opportunity to respond to the report. The matter was then referred to the Joint Disciplinary Board. The complainant was informed of, and did not object to, the composition of the Board.

In its report of 24 August 1999 the Joint Disciplinary Board concluded that the case of misconduct against the complainant was based on "clear evidence of presentation of [a] falsified document and misrepresentation before the Court in Floridsdorf by [the complainant] who intentionally committed these acts with a view to substantiating his claim in the Court case for reduction of child's allowance". He had, thereby, violated the Rules of Conduct for International Civil Servants as set out in Administrative Manual Part II, Section 17. The Board also noted that "while there could be no mitigating factor, the consistent denial by [the complainant] about presentation of the fabricated [report] could be considered as an aggravating factor". It recommended that he "be given a suspension without salary for two ... weeks as a disciplinary measure befitting his misconduct".

In a letter of 25 November 1999 the Acting Director of the Division of Personnel informed the complainant that the Director General had concluded that the recommendation appeared too lenient and that he had decided to suspend the complainant for three months without pay, from 26 November 1999 to 25 February 2000. That is the impugned decision.

2. The complainant raises four pleas.

(a) He claims his suspension is unjust. He did say that he could lose his job if he did not attend the course; but he did not say that it was required by his employers, as was later misconstrued. Also, he did not intend to send the performance appraisal report; he thought he had sent a school registration paper which was similar in form and content. He claims that his employers were obliged to make allowances for the fact that he had made a mistake.

He contends that the Joint Disciplinary Board was biased; it was influenced by the Administration which put pressure on it to reach an "unjust verdict". He also objects to the IAEA's interference in his private affairs.

(b) He says it was unfair to suspend him without notice.

(c) He claims he suffered discrimination because he was not upgraded from G.5 to G.6 as recommended by his supervisor, since it was not approved by the Personnel Division.

(d) He claims that the Agency is guilty of "malicious defamation" because three of his friends who rang him at his office were told he had been suspended for three months; this was making a private matter public.

As a result of all of these, he claims that his right to a fair trial was breached, and that he was subjected to "hardship and torture". His own and his family's health was put at risk by the cancellation of his health insurance without notice. His reputation was "maliciously damaged" and because of his suspension he suffered various medical problems. He attributes a car accident to the shock of receiving the suspension letter.

3. The Agency submits that clear documentary evidence of the complainant's serious misconduct was contained in the Protocol recorded by the District Court. He admitted that he had prepared the performance appraisal report himself although he denied that he intended it to be considered as an official report. The Agency contends that the complainant's arguments are not credible.

The IAEA also submits that all the necessary procedures were followed in setting up the Joint Disciplinary Board and the complainant accepted its composition. The Director General is not obliged to accept the Board's recommendations, which are merely advisory.

Concerning the lack of notice of his suspension, the Agency submits that Staff Rule 11.01.2 allows for disciplinary measures to be summarily imposed in instances of serious misconduct.

The allegation that his privacy was violated, when callers to his office were informed that he had been suspended, has not been proved. Even if people who inquired about him were informed that he was away from his office until a specific date, this was in no way defamatory.

As to his claim that his own and his family's health insurance was suspended without prior notice, this information was contained in the notification of suspension.

The Agency submits that the disciplinary measure was the direct result of the complainant's wrongdoing and he has to take full responsibility for his actions.

Other allegations made by the complainant, such as those based on the reasons why he was not upgraded, have not been proved and should be dismissed.

4. The Tribunal is satisfied that the Joint Disciplinary Board was entitled, having weighed the evidence, to draw the conclusions it did. It found that the complainant's explanations were not credible and rejected them. Where doubt does not exist, the question of the benefit of the doubt does not arise. So the complainant cannot succeed on the plea that his employer was bound to accept that he had made a mistake. The Board was fully justified in its findings.

5. There is no substance to his plea that the Board was biased. It was constituted in accordance with the Staff Rules and the complainant did not object to its composition. It is contradictory to suggest that pressure was put on the Board to recommend a two-week suspension, when the Director General did not in fact accept this recommendation but instead opted for a more severe sanction of three months' suspension.

6. The complainant cannot complain about the Agency becoming concerned in his private domestic affairs since it was he who involved it by submitting a false statement and a falsified document to the Floridsdorf District Court.

7. While Rule 11.01.2 provides what the disciplinary measures may be, the procedures to be followed in the event of reported misconduct are set out in the Administrative Manual in Appendix E of Part II, Section 1. They have been followed by the Agency. Paragraph 11 of those procedures states:

> "The decision of the Director General on the implementation of the disciplinary measure ... together with the report of the Joint Disciplinary Board, shall be communicated in writing to the staff member by the Director, Division of Personnel."

There is no provision as to the length of notice which must be provided.

This plea fails.

8. His plea of discrimination because he was not upgraded is completely irrelevant to his suspension.

9. Malicious defamation does not arise since there is no proof that anything untrue was said about the complainant.

10. All of the injuries which he lists as flowing from his suspension are in fact due to his own wrongdoing which caused the suspension. There is no basis on which he could be entitled to damages in respect of any of them.

11. One of the consequences which he lists is that his own and his family's health insurance was cancelled without notice. This is not true. He was notified in the letter of suspension that he might wish to contact the Social Security Unit to make the necessary arrangements for continued coverage.

12. The complainant's claims are dismissed in their entirety.

## DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

***Registry's translation, the French text alone being authoritative.***

# NINETIETH SESSION

***In re* Bouzaïene** **Judgment No. 2010**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the complaint filed by Mr Naceur Bouzaïene against the World Health Organization (WHO) on 4 November 1999 and corrected on 17 February 2000, the WHO's reply of 23 May, the complainant's rejoinder of 27 July and the Organization's surrejoinder of 28 September 2000;**

**Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;**

**Having examined the written submissions and disallowed the complainant's application for hearings;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, an accountant of French nationality born in 1952, was hired by the WHO as a consultant for six months from 6 July 1998. His duties were to include training staff at the Regional Office for Africa, in Harare (Zimbabwe), in financial management, as well as evaluating audit reports and checking the Office's internal control mechanism. However, before leaving for Harare he was to spend two months at WHO headquarters in Geneva to familiarise himself with the Organization's financial and accounting procedures.**

His departure for Harare was scheduled for 1 September 1998 but the acting Director of the Division of Budget and Finance informed him in a letter of 26 August that his contract would be terminated as from the following day because an assesament of his capabilities during the two months he had spent at headquarters had not been positive. The Organization would pay him thirty days' salary in lieu of notice. On 8 September the complainant wrote to the Director-General challenging that decision. By a letter of 29 October 1998 the Director of the Personnel Division upheld it, explaining that the sole reason for it was the complainant's inaptitude for the job of personnel trainer at the Regional Office. On 30 April 1999 the complainant filed an appeal with the Headquarters Board of Appeal against the decision to terminate his appointment. In its report of 24 June the Board concluded that the appeal was out of time and therefore irreceivable. By a letter of 9 August 1999 the Director-General endorsed the Board's conclusion and rejected the appeal. That is the impugned decision.

B. According to WHO Manual paragraph II.12.550, "The appointment of consultants may be terminated by the Organization at any time upon thirty days' notice, unless otherwise specified in the offer of appointment". The complainant pleads breach of that rule on two counts: first, his contract specified the term of his appointment and could not be terminated before its expiry and, secondly, "the termination [came] after the prescribed thirty days". He adds that, contrary to Manual paragraph II.12.580, there was no appraisal of his performance, yet the reason given for his termination was that he was unfit to perform his duties. He asserts that no one commented on the quality of his work in the two months he spent preparing for his mission. He considers the decision arbitrary.

The complainant claims payment of his salary, including per diem, until the expiry of his contract, compensation for injury in an amount equivalent to six months' additional salary, to include per diem, and 34,200 United States dollars in damages. He also claims costs.

C. In its reply the Organization pleads that the complaint is irreceivable because the internal appeal was out of time. The complainant should have challenged the decision to end his appointment within sixty days of it being notified to him, but he lodged his appeal more than eight months later.

In subsidiary argument the Organization contends that the complaint is devoid of merit. First, the fact that the contract specified an expiry date, as all temporary contracts do, did not exclude implementation of Manual paragraph II.12.550, which is about early termination. Furthermore, the complainant contradicts himself: he asserts on the one hand that his contract could not be terminated before its expiry and, on the other, that it could be terminated only within the first thirty days. Secondly, that paragraph does not say that the contract may be terminated only within the first thirty days, but that it may be terminated subject to thirty days' notice. Thirdly, a performance report is not a prerequisite for terminating a consultant's appointment. Fourthly, the decision was not arbitrary: the complainant's knowledge of financial procedures and mechanisms and his command of English had turned out to be quite inadequate for the duties he would have to perform. To have kept him on would have been contrary to the interests of the Organization. Lastly, it considers the complainant's claims to be excessive.

D. The complainant rejoins that although he received the impugned decision, it was never "notified" to him. In his view, the sending of a mere letter does not amount to notification: the decision should have been sent to him by registered mail with acknowledgement of receipt or by an *acte extrajudiciaire*. Moreover, the decision should have stated the available means of redress and the time limits for using them.

On the merits the complainant submits that Manual paragraph II.12.550 fails to specify whether the appointments it refers to are fixed-term or indefinite. In his submission, fixed-term appointments may be terminated "only on serious grounds, which were not demonstrated here". Furthermore, under II.12.550 only the employee may terminate the appointment by giving thirty days' notice; termination by the Organization must be within the first thirty days, which correspond to a trial period. Lastly, he maintains that the WHO was bound to prepare an evaluation report on his performance and that the case law requires that a warning must be given sufficiently early to allow the staff member to improve.

E. In its surrejoinder, citing the Tribunal's case law the Organization maintains that the internal appeal was out of time. It submits that the time limit starts to run from the date on which the staff member learns of the decision through official channels, no specific notification procedure being necessary. The absence of any indication of available remedies can invalidate the notification only "in exceptional circumstances", which was not the case here.

As for the drafting of an evaluation report on his performance and the warning about the quality of his work, the Organization contends that the case law the complainant cites refers only to appointments of at least one year.

## CONSIDERATIONS

1. The WHO hired the complainant as a consultant for the period from 6 July 1998 to 6 January 1999 to carry out a mission in Harare (Zimbabwe). Before going there he was to spend two months at headquarters in Geneva to be briefed on what his work would involve and to familiarise himself with WHO financial and accounting procedures.

By a letter of 26 August 1998 he was informed that the WHO had decided to terminate his appointment as from 27 August 1998, on the grounds that it had become clear after his two months at headquarters that he was unfit to carry out the mission in Harare. On 8 September

1998 the complainant wrote to the Director-General challenging that decision. The Organization upheld it in a letter of 29 October 1998.

2. On 30 April 1999 the complainant appealed to the Headquarters Board of Appeal against his "unlawful dismissal, with no evaluation". On 24 June 1999 the Board concluded that the appeal was irreceivable since it was filed outside the time limit prescribed in the Staff Rules, and recommended that the Director-General reject it. The Director-General endorsed the recommendation and so informed the complainant in a letter of 9 August 1999. That is the decision the complainant is impugning in his complaint of 4 November 1999 to the Tribunal.

3. The Organization submits that the complaint is irreceivable because, having failed to appeal to the Board of Appeal within sixty days, the complainant did not exhaust all means of redress available to him under the Staff Regulations, as Article VII of the Statute of the Tribunal and the case law require.

4. After asserting in his internal appeal that he knew neither of the Board's existence nor of the procedure he should follow, the complainant seems to have abandoned that plea – which would in any event have failed – in favour of the argument that the Organization gave him no notification setting an irrefutable date of termination of his appointment. In his view, it could not "claim that an ordinary letter of 30 August 1668 [*recte* 1998] set off the two-month time limit".

5. Staff Rule 1230.8.3 provides:

> "A staff member wishing to appeal against a final action must dispatch to the Board concerned, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal specifying the action against which appeal is made ..."

6. The Tribunal observes that the complainant, while not denying that this rule applies to his case, is more concerned with demonstrating the absence of any notification with an irrefutable date: he was informed

**of the decision of 26 August by ordinary letter, not by a registered letter with acknowledgement of receipt or an *acte extrajudiciaire*.**

**7. The evidence shows that the complainant did receive the decision of 26 August 1998 terminating his appointment, that he challenged it by a letter of 8 September 1998 to the Director-General and that it was upheld in a letter of 29 October 1998. The complainant does not deny receiving the letter of 29 October, indeed he attaches it to his complaint. Furthermore, on 4 January 1999 he wrote to the President of the Tribunal about the termination of his appointment.**

**Since the Staff Rules establish no specific procedure for the notification of final decisions, the time limit for appeals set in Staff Rule 1230.8.3 began to run as soon as the complainant learned officially of the decision adversely affecting him, even if the notification gave no indication of the means of resisting it and the time limits for doing so.**

**The conclusion is that, whether the decision of 26 August 1998 or the letter of 29 October 1998 confirming it is taken into consideration, by filing his appeal with the Headquarters Board of Appeal on 30 April 1999 the complainant exceeded the prescribed sixty-day time limit. The Board was therefore right to find his appeal irreceivable.**

**8. Under Article VII of the Statute of the Tribunal, a complaint is not receivable unless the decision impugned is a final one and such remedies as are available under the applicable Staff Regulations have been exhausted. To satisfy that requirement the staff member must have duly lodged an internal appeal with the competent body within the prescribed time limit.**

**Since the complainant failed to file an internal appeal with the Board within the sixty days set in Staff Rule 1230.8.3, his complaint is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute and must accordingly be dismissed.**

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

# NINETIETH SESSION

***In re* Dormond Vega and González Vega**

**Judgment No. 2011**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Miss Denia Dormond Vega and Miss Yadira González Vega against the International Labour Organization (ILO) on 8 October 1999 and corrected on 25 January 2000, the ILO's reply of 3 May, the complainants' rejoinder of 10 August and the Organization's surrejoinder of 13 September 2000;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are both citizens of Costa Rica. Miss González Vega took up employment with the International Labour Office, secretariat of the ILO, in March 1986 as a secretary on a technical cooperation project at grade L.4. On 1 December 1992 her position was regraded at L.5. On 1 January 1994 she was assigned through a temporary transfer to a position of secretary in the newly established ILO Multidisciplinary Team (MDT) in the ILO's Area Office in San José, Costa Rica. She was offered the position at grade L.5 on the basis of a three-month contract which was subsequently extended. Miss Dormond Vega was recruited in April 1994 for a similar position as a secretary within the MDT on a special short-term appointment, also at grade L.5. Since the MDT formed a new part of the ILO's structure and came within the ILO's regular budget, positions within it had to be graded according to existing standard procedures and put up for competition: that was the case for the positions occupied by the complainants.

Later in 1994 job descriptions for those positions were drawn up. In November 1994 the ILO's Regional Office for Latin America and the Caribbean, in Lima, Peru, assessed both positions at grade L.4, and a competition was opened to fill them at the beginning of 1995. The complainants applied and were subsequently appointed. At its meeting of 4 July 1995 the Regional Selection Board, taking account of the financial uncertainty within the Organization, recommended that the complainants' contracts be extended only to the end of the year and that their grades be set at L.4, step 2. Having adopted that recommendation the Director of the Regional Office notified his decision to the Director of the Area Office on 10 July. The complainants protested about that lower grade on 17 July 1995 and in August 1995 their contracts were extended at grade L.5, pending further reconsideration. The Director of the Regional Office wrote again to the Director of the Area Office on 29 September 1995 confirming the complainants' appointments from 1 October to 31 December 1995, at grade L.4, but at step 5. The complainants signed the corresponding contracts on 4 October 1995. Their contracts were again extended in 1996.

On 16 July 1996 the complainants wrote to the Director of the Area Office, asking him to initiate proceedings with the Regional Office for the reclassification of their positions. The matter was taken up in correspondence between the Area Office and the Regional Office in early 1997. In October 1997 the complainants wrote to the Deputy Regional Director mentioning that they had never filled out any classification review forms. In an e-mail to the complainants on 27 November 1997 the Personnel Officer in Lima told the complainants that the matter had been submitted to ILO headquarters.

On 17 April 1998 the complainants wrote to the Regional Director indicating their intention to file an internal complaint under Article 13.2 of the Staff Regulations. In letters of 29 April the Regional Director asked both complainants to specify the nature of their "concerns and expectations in relation with [their] present labour conditions". They responded on 4 May 1998 specifying that they wished to be granted grade L.5 as from October 1995. On 18 June the complainants confirmed to the Regional Director their intention to submit an internal complaint. After obtaining views from headquarters the Regional Director replied to their letters on 30 October 1998 saying that their positions had been formally classified on 3 November 1994, and that no elements had been found that would make the Regional Office alter its decision of 29 September 1995 by which they were assigned grade L.4, step 5.

On 12 April 1999 they filed a joint internal complaint under Article 13.2 against the decision of 30 October 1998. The Director of the Personnel Department replied to each complainant on behalf of the Director-General on 9 July 1999. She pointed out that ILO headquarters had agreed "voluntarily" to examine the complainants' situation and had concluded that the decision taken on 29 September 1995 was "in accordance with existing regulations". She said that the decision of 30 October 1998 did not constitute a "new decision" setting off new time limits and that their claims were, therefore, irreceivable under Article 13.2 – which imposes a six-month time limit for challenging a decision – since their claims were made against a measure that had been applied to them from September 1995. That is the decision now impugned.

B. The complainants submit that the Director of Personnel erred in determining that the communication of 30 October 1998 did not constitute a "new decision" against which they could appeal. They state that when the Regional Director wrote to them on 29 April 1998 he asked for a "written communication" setting out their concerns which would help him to take a "final and formal decision". It is clear from the wording of his letter that he did not think a formal decision had yet been taken. They had therefore assumed that a review would take place and that a formal decision would follow. They contest the Organization's assertion that the review it carried out at headquarters was purely "voluntary". Contrary to what the Director of Personnel affirmed, it is clear that the letter of 30 October 1998 constituted a formal decision within the meaning of Article 13.2, and their internal complaint was thus lodged within the required time limit.

The complainants also contend that the Regional Director erred in his decision of 30 October 1998 and he was wrong to affirm that no elements had been found to make the Regional Office alter its decision of 29 September 1995 by which their positions were graded at L.4. They contest his view that their positions were "formally" classified on 3 November 1994 and seek documentary evidence in support of that assertion. Indeed, the decision of 29 September 1995 was itself only "temporary in character" and involved matters that were, in part, irrelevant to the grading issue. They submit that the view of the Regional Office was "tainted by incoherence", and that the Organization was "unjustifiably dilatory" and made the process drag on for five years.

On the merits, the complainants point out that their positions were initially offered to them at grade L.5. Upon recruitment their grades were fixed at L.5 by the Director of the Multidisciplinary Team. They did not doubt his "ostensible authority" to offer them appointments at that level. They signed their contracts in good faith with the legitimate expectation that their employment would continue at that grade.

There was failure to follow proper procedures in determining the level of their positions. Details of the methodology applied have never been provided, the usual procedure for classifying a position was not followed and they did not fill in a "post description questionnaire". The classification of their positions at L.4 was arbitrary. The contracts they signed on 4 October 1995, which set the grade at L.4, were offered to them on "ambiguous terms" and they had no alternative but to sign. They did so under protest, which cannot be construed as acceptance of the grade.

They want the Organization to confirm their grades at L.5 and pay them the difference in salary on that basis from 1995. They also ask for costs.

C. The Organization, in its reply, argues that their internal complaint was irreceivable as are their complaints to the Tribunal. While the complainants impugned the decision of 30 October 1998 in their internal complaint, that appeal was in fact lodged against the classification of their positions at L.4. A decision as to the grade of their positions was taken by the Regional Director on 29 September 1995 and reference was made to it in the contract extension signed by them a few days later on 4 October. They did not challenge that decision within the six-month time limit imposed by Article 13.2. The Regional Office took action at various levels to see if a solution to their problems could be found. It did not react to a specific claim from the complainants but rather in response to their concerns. Their first formal claim was dated 4 May 1998. The Organization contends that in his letter of 29 April 1998 the Regional Director did not state that he would take a "final" formal decision: the complainants inserted the word "final" as an afterthought in the translation given in their pleadings. The original Spanish text does not contain such a notion.

Citing the Tribunal's case law, the Organization says that although discussion may take place after a final decision is taken, that does not necessarily mean that there will be a new final decision. The decision of 30 October 1998 was but confirmation of the decision taken in September 1995. Any "temporary nature" of the decision of 29 September 1995 arose in relation to another secretarial position, mentioned in the letter but which is not at issue in this case. When the complainants signed their contracts on 4 October 1995 they were well aware of the grading issue and any expectation they might still have had of obtaining grade L.5 could not be construed as providing a right to that grade.

Subsidiarily, the ILO argues that the complainants' pleas are devoid of merit. It explains that, pending the evaluation of long-term staffing needs, some officials, including the complainants, were assigned on a temporary basis to assist in the setting up of the MDT. In Miss González Vega's case, she kept grade L.5 which she had held when she worked on the technical cooperation project. Staff on such projects are not subject to ILO grading standards and procedures. Miss Dormond Vega was initially put on the same grade as her colleague because the tasks assigned to them were the same. The secretarial positions in the MDT were to be financed through the ILO's regular budget, which meant that the statutory selection procedure eventually had to take place. Appointment had to be made at the grade pertaining to the posts. Job descriptions were drawn up for the complainants' positions and they were classified in accordance with ILO standards. The defendant points out that the grading of vacant positions is not open to challenge, and no member of staff can initiate the reclassification of his or her job until a year after being appointed. Even thereafter the complainants did not initiate a formal reclassification procedure.

D. In their rejoinder the complainants press their pleas. Even had there been a "valid" decision on the grading of their positions in 1995 or 1996 they would not have been able to challenge it since in view of the financial crisis the Organization was facing, the Director-General had "frozen" all reclassification proceedings. They adhere to their view that the positions were never "classified". If they had been, the relevant files would show on what basis such grading was carried out. They note that the Organization produced no document in the reply to clarify the matter. For that reason the "grading" decision communicated to them in September 1995 was procedurally flawed. It was, therefore, a tainted decision which was "confirmed" by the Regional Director's letter of 30 October 1998.

In their summary of the chronology of their case they say that, in 1994, the then Director of the MDT told them that if they won the competition he would have their positions regraded to L.5. They take the view that the Organization did not handle the grading issue "properly, transparently or fairly".

E. In its surrejoinder the ILO argues that even if they considered that the 1995 decision to fix their grades at L.4 was procedurally flawed, the complainants failed to appeal against it within the six-month time limit imposed by Article 13.2. Only in May 1998 did they clarify that they wished to obtain grade L.5 on a retroactive basis.

It says that the complainants' argument regarding the freezing of the classification review process is inconsistent with the facts since it did not apply in their case. A classification review is still open to them.

The Organization notes that the complainants do not challenge the accuracy of the job descriptions prepared by their responsible chief in 1994 which formed the basis for the grading decision. These were studied in conjunction with the "Global classification standard for the General Service at non-headquarters duty stations" which contains a benchmark standard for a secretary at G.4 level – equivalent to grade L.4 for field positions. There is no basis for the complainants' claim that the 1994 procedure was tainted with irregularity. Their new plea relating to an alleged promise by the former Director of the MDT also fails. It is unsubstantiated and conflicts with earlier arguments.

## CONSIDERATIONS

1. The complainants, who are both secretaries with the ILO Area Office in San José, Costa Rica, are contesting a decision of the Director-General of the ILO dated 9 July 1999 confirming the grading of their positions at grade L.4.

2. In 1994 both complainants were offered short-term contracts at grade L.5 with the ILO's newly formed Multidisciplinary Team (MDT) in San José. Miss González Vega had worked for the ILO since 1986 as a secretary on a technical cooperation project and Miss Dormond Vega was appointed directly to the MDT in April 1994.

3. The then Director of the MDT, who was new to the ILO, was unaware that he had to follow certain procedures for filling vacancies and classifying positions. He later attempted to rectify the situation by requesting the classification of the complainants' positions, suggesting grade L.5, but on 29 September 1995 the L.4 grade was assigned to both positions by the Regional Office in Lima (Peru).

4. A competition for filling the positions was carried out in 1995 and the complainants were selected. On 4 October 1995 they accepted the appointments at grade L.4 and were granted step 5 in that grade.

5. In July 1996 the complainants wrote to the Director of the Area Office asking for a formal request to be made to the Regional Office for the reclassification of their positions.

6. In July 1997 the Regional Personnel Officer visited the Area Office to discuss, inter alia, the classification issue with the complainants. He suggested that if they could achieve certification in English through language training, which the complainants undertook, this would make it

possible to change their grade back to L.5. The proposed reclassification never materialised but in their pleadings the complainants have not pressed the fact that they took the suggested English course as a ground upon which they should now receive the requested reclassification.

7. In a letter of 18 June 1998 to the Regional Director the complainants confirmed their intention to submit an internal complaint.

8. On 30 October 1998 the Regional Director replied on the substance of the case, maintaining the classification of the positions at the L.4 level. He found that the complainants had submitted their applications in a competition opened to fill the positions described in the published vacancy announcement, which specified that they were classified at grade L.4. The complainants were therefore entirely aware of the consequences of their applications. He pointed out that, in spite of having objected to the Regional Office's decision of 29 September 1995, the complainants had eventually accepted the offer of the positions at grade L.4 on 4 October 1995.

9. On 12 April 1999 the complainants submitted an internal complaint pursuant to Article 13.2 of the Staff Regulations, challenging the letter of the Regional Director dated 30 October 1998.

10. On 9 July 1999 the complainants received a reply from the Director of the Personnel Department on behalf of the Director-General refusing their internal complaint on the grounds that the Regional Director's communication could not be considered as a "new decision" and was not appealable under Article 13.2 and that consequently their complaint was not receivable.

11. The issue to be determined in the present case is whether their internal complaint was receivable under Article 13.2 of the Staff Regulations, and in consequence, whether the complaints before this Tribunal are receivable. Article 13.2 states that:

> "Any complaint by an official that he has been treated inconsistently with the provisions of these Regulations, or with the terms of his contract of employment, or that has been subjected to unjustifiable or unfair treatment by a superior

> official shall, except as may be otherwise provided in these Regulations, be addressed to the Director-General through the official's responsible chief and through the Personnel Department, within six-months of the treatment complained of. ..."

12. It is quite clear that in the present case, a final decision on the question of the classification of the complainants' positions was made on 29 September 1995, as the memorandum sent by the Regional Office to the Director of the Area Office shows:

> "Further to your letter of 9.8.95 ... I wish to make the following, final, clarification regarding the recent competition for ... secretaries for the San José MDT.
>
> ...
>
> I should like to receive a proposal from the San José office on how to resolve the question of which candidate should be secretary to the Director [of the MDT]. Until the criteria for selection of who will be secretary to the Director is clarified, all three candidates [the complainants and one other] should receive the same grade: L4. As a concession to the confusion that has existed in this competition, and the fact that all three secretaries have relevant ILO experience ... they may be granted a step of "5" (therefore their grade will be L4 / step 5). ..."

13. The Regional Director, referring to the early stages of the grading issue, stated in a letter to Miss González Vega on 30 October 1998:

> "First of all, I would like to indicate the circumstances under which the level L5 was initially assigned to the MDT secretarial jobs. As you know, during that time, the MDT was being established in San José, and it required secretarial support to assist the Director and the specialists. Your transfer from the [technical cooperation project] in which you worked ... to the MDT in San José was accepted, and you were hired temporarily to carry out secretarial duties. Under these circumstances, it was decided that you would maintain the L5 grade, which you had at the moment of the transfer. In spite of the fact that you had not obtained such grade as a result of an exercise in classification, it was assigned based on classification procedures that are usually applied to projects which are substantially different from those applied to positions that are financed with the regular budget. Therefore, I would like to emphasize that the L5 grade was not assigned in accordance with the duties related to your secretarial job at MDT, but rather taking into consideration your personal situation. As a consequence, the results of a subsequent exercise in classification, carried out in accordance with the established regulations for positions financed with the regular budget, have to prevail. The MDT secretarial positions were formally classified as L4 grade on November 3, 1994."

The Regional Director expressed the same views in a letter sent to Miss Dormond Vega on the same date.

14. Except as regards the position of secretary to the Director of the MDT (not held by either complainant) the grading decision was clearly not a temporary one.

15. The Regional Director's decision of 29 September 1995 was implemented on 4 October 1995, when each complainant was offered and signed a contract extension at grade L.4, step 5. The contracts show no sign of any reservation or protest on the part of the complainants. In their pleadings to the Tribunal they say they signed "under protest". They did not, however, lodge an internal complaint under Article 13.2 with respect to that decision. In fact, it was not until 16 July 1996 that the complainants wrote to the Director of the Area Office asking for a formal request to be made to the Regional Office for the reclassification of their positions. That letter was sent long after the time for filing an internal complaint against the decision contained in the 29 September 1995 memorandum had elapsed.

16. The complainants contend that the Regional Director, in his letter dated 29 April 1998, committed himself to making a decision on the complainants' claims. The relevant part of that letter reads:*

> "Concerning your request, we have not been officially seized of the petitions that you are demanding. Unofficially, we know about the aspects that you want to have solved, but these communications have not been transmitted in full, and sometimes they are contradictory. Therefore, I would appreciate it very much if you sent me a written communication with your concerns and expectations in relation with your present labor conditions. Said communication would allow us to complete your personal file, which is very complex, and at the same time it would be one of the instruments required to take a formal decision (*'para adoptar alguna decisión formal'*)."

17. On 4 May 1998 the complainants wrote to the Regional Director to specify their proposal, which was that they should be accorded grade L.5 as of October 1995, including retroactive payment of the difference in salary together with reinstatement in all their rights as if their grade had been L.5

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*Complainants' translation from Spanish.

since that date. This letter led to the Regional Director's reply of 30 October 1998. He wrote to each complainant in similar terms as follows:*

> "In reference to your communication from last May 4 1998, in which you request to be reinstated in the L5 grade, which you held before being designated in your present position, classified as grade L4.
>
> ....
>
> You submitted your application in [a] competition to fill the position according to the published vacancy announcement, which specified that said position was classified as L4 grade. You were entirely aware of the consequences of your application; in particular, with respect to the lower grade and salary that you would receive. However, these terms of the contract did not discourage you from applying, nor from accepting the position. In spite of having objected to this Regional Office's decision on [sic] September 29, 1995, you eventually accepted the offer of the position with the L4 grade on October 4, 1995.
>
> ....
>
> Considering the circumstances mentioned before, I regret to inform you that elements that make it possible to change this Office's decision from [sic] September 29 1995 - by which you were assigned grade L4, step 5 - have not been found."

18. The issue of receivability hinges on whether or not the Regional Director's letter dated 30 October 1998 constitutes a new decision. According to the case law of the Tribunal, for a decision, taken after an initial decision has been made, to be considered as a new decision (setting off new time limits for the submission of an internal appeal) the following conditions are to be met. The new decision must alter the previous decision and not be identical in substance, or at least must provide further justification, and must relate to different issues from the previous one or be based on new grounds (see Judgments 660, *in re* de Louw No. 2 and 759, *in re* Benze No. 3). It must not be a mere confirmation of the original decision (see Judgment 1304, *in re* Coe). The fact that discussions take place after a final decision is reached does not mean that the Organization has taken a new and final decision. A decision made in different terms, but with the same meaning and purport as a previous one, does not constitute a new decision giving rise to new time limits (see Judgment 586, *in re* de Villegas No. 6), nor does a reply to requests for reconsideration made after a final decision has been taken (see Judgment 1528, *in re* Saunders No. 16).

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*Complainants' translation from Spanish.

**19. The letter dated 30 October 1998 simply cannot be construed as being a "new decision". It is, and is stated to be, merely a confirmation of the initial decision made on 29 September 1995. The terms are explicit. Whatever the correct construction may be of the Regional Director's letter of 29 April 1998, it cannot change the nature and content of his subsequent letter of 30 October 1998 which refused to vary the 29 September 1995 decision. The time limit for contesting the latter had by that time long since expired and the complainants' internal complaint was accordingly not receivable. That being the case, it is likewise with their recourse before the Tribunal.**

## DECISION

**For the above reasons,**

**The complaints are dismissed as irreceivable.**

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Mrs Mella Carroll, Vice-President, and [illegible]

**Organisation internationale du Travail** **International Labour Organization**
***Tribunal administratif*** ***Administrative Tribunal***

# NINETIETH SESSION

***In re* Goettgens (No. 5)** **Judgment No. 2012**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the fifth complaint filed by Mr Johannes Karl Wilhelm Goettgens against the European Patent Organisation (EPO) on 8 March 2000, the EPO's reply of 26 May, the complainant's rejoinder of 30 June, and the Organisation's letter of 11 July 2000 to the Registrar of the Tribunal waiving its right to submit a surrejoinder;**

**Considering Article II, paragraph 5, of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which neither party has applied for;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. Facts relevant to this case are set out under A in Judgments 1517 and 1518 on the complainant's second and third complaints.**

**In 1979 the complainant was seconded to the EPO from the German Patent Office where he had worked first as a salaried employee and then as a civil servant. While at the German Patent Office he contributed to two pension schemes: the German social security pension insurance scheme, administered by the Federal Insurance Office for Salaried Employees (*Bundesversicherungsanstalt für Angestellte* (BfA)) and the civil service pension scheme.**

On 8 December 1995 the EPO and the Federal Republic of Germany entered into an "Agreement ... on the implementation of Article 12 of the Pension Scheme Regulations of the European Patent Office" which came into force on 21 September 1996. In the February 1997 issue of the EPO *Gazette*, the Office published its interpretation of "previous pension scheme" as used in Article 12. This phrase was defined to mean "the last pension scheme to which the staff member made contributions before joining the Office". In addition, it was pointed out that it was "not possible to transfer in isolation rights accrued with the social security pension scheme".

On 10 March 1997 the complainant requested the transfer to the Office's Pension Fund of his pension rights under the German social security pension insurance scheme (hereinafter referred to as the BfA scheme). He expressed doubts that the rights accrued under the civil service pension scheme could also be transferred. On 18 April he lodged an internal appeal with the President of the Office against the "decision" published in the February 1997 issue of the *Gazette*.

In March 1998 the EPO informed the staff, by an article published in the *Gazette*, that the Federal Ministry of Justice had concluded that the above-mentioned Agreement did not apply to civil servants who had already retired from the national civil service, because their status ended upon retirement. The complainant was affected since he had retired from the national civil service in 1993.

On 26 May 1998 the Head of the Remuneration Department informed the complainant that his request of 10 March 1997 was refused because the BfA scheme was not the last pension scheme to which he was affiliated immediately before joining the EPO. The complainant replied that it was only the transfer of his BfA scheme entitlements that he was requesting. On 23 July 1998 the Remuneration Department confirmed its previous decision.

On 28 July 1998 the complainant filed an internal appeal against the decision of 23 July. In this appeal he requested joinder of the appeal he had lodged on 18 April 1997, but had not yet been heard. Having met on 27 October 1999, the Appeals Committee in its opinion dated 6 December unanimously recommended, in so far as they were receivable, dismissing his appeals as unfounded. On 13 December 1999 the Director of Personnel

Development informed the complainant that the President of the Office had rejected his appeals. That is the impugned decision.

B. The complainant argues that the decision of the President was based on a misinterpretation of facts and evidence. He belonged simultaneously to two previous pension schemes: the civil service and the BfA schemes. Article 12 clearly addresses the "previous pension scheme" whereas Rule 12.1/1 i) a) of the Implementing Rules to the Pension Scheme Regulations refers to "pension schemes preceding entry into the service of the Office". While recognising that his civil service pension rights cannot be transferred, he claims that the Office has no legal basis for rejecting his request to transfer his BfA pension rights.

He requests the Tribunal to: (1) quash the President's decision of 13 December 1999; (2) order the EPO to request information from the BfA about the amount of his pension, including interest; to recalculate his EPO pension; and then to give him the choice of transferring his BfA pension rights; (3) order the EPO to pay him the newly calculated pension and the difference between the old and new pensions "from the beginning", plus interest, if he opts to transfer his BfA pension rights; and (4) award costs for telephone, postage, photocopies and travel to Munich.

C. In its reply the EPO submits that the complaint is unfounded. It is clear from the wording of Article 12 that the intention of the lawmakers was to allow the possibility of transferring only the pension rights accrued under the scheme applicable immediately before joining the EPO. Furthermore, the complainant is asking for an "isolated transfer right", which has been specifically excluded by that article. The Organisation notes that the complainant has been benefiting from the BfA scheme; he has therefore not suffered any injury by the EPO's denial of his request.

D. In his rejoinder the complainant states that as an employee of the German Patent Office he contributed to the BfA scheme and as a civil servant with the same employer he contributed to the civil servants' pension. There is no reason to consider him as having been employed by two different employers simply because of a change in status.

## CONSIDERATIONS

1. The complainant impugns the decision of the President of the European Patent Office denying him the possibility of transferring to the EPO pension scheme his rights accrued under the German social security pension insurance scheme (the BfA scheme).

2. The complainant is a German national, born in 1928. He was employed by the German Patent Office, first as a salaried employee and then, from 1 August 1966 to 1 April 1979, as a civil servant. As a salaried employee, he paid contributions to the BfA scheme but as a civil servant, he was compulsorily affiliated to the civil servants' pension scheme. However, he continued to contribute to the BfA scheme, concurrently and on a voluntary basis, until 31 December 1977. On 1 April 1979 the complainant joined the staff of the EPO. On 1 March 1992 he retired from the EPO and on 1 January 1993 he also retired from the German civil service.

3. On 8 December 1995 the EPO and the Federal Republic of Germany entered into an "Agreement ... on the implementation of Article 12 of the Pension Scheme Regulations of the European Patent Office". The Agreement came into force on 21 September 1996.

4. On 10 March 1997 the complainant requested, pursuant to this Agreement, that the entitlements he had accrued with the BfA scheme up to the end of 1977 in parallel with those acquired under the pension scheme for civil servants up to March 1979, be transferred to the Office.

5. On 18 April 1997 the complainant lodged an internal appeal against the interpretation which had been published by the EPO Administration in the *Gazette* of the terms "previous pension scheme" used in Article 12 of the Office's Pension Scheme Regulations.

6. On 26 May 1998 the Head of the Remuneration Department informed the complainant that his request for the transfer of his BfA pension

rights could not be allowed, because, according to Article 12(1) of the Office's Pension Scheme Regulations and Rule 12.1/1 of the Implementing Rules, only those rights which were accrued under the pension scheme to which the staff member was affiliated immediately prior to joining the EPO could be transferred. Since the complainant was a German civil servant before entering the service of the EPO, the BfA scheme was not the last pension scheme to which he was affiliated.

7. In a letter dated 10 June 1998, the complainant replied that he was only requesting the transfer of his BfA scheme entitlements. On 23 July 1998, the Remuneration Department confirmed its decision dated 26 May 1998.

8. On 28 July 1998 the complainant filed an internal appeal against the decision of 23 July.

9. On 27 October 1999 the Appeals Committee unanimously recommended rejecting the internal appeals on the grounds of irreceivability as regards the publication in the *Gazette* and of lack of foundation as regards the 23 July decision. On 13 December 1999 the complainant was informed of the President's endorsement of the Committee's recommendation. That is the impugned decision.

10. The rejection of the complainant's first internal appeal on the grounds of irreceivability is clearly well-founded: the interpretation published in the *Gazette* is not a "decision" affecting the complainant's rights; it is only an expression of opinion which has no obligatory force.

11. The rejection of the complainant's claim asserted in his second internal appeal flows inevitably from the provisions of the applicable rules themselves. They are quite clear. Article 12(1) of the Office's Pension Scheme Regulations states that:

> "An employee who enters the service of the Office after leaving the service of a government department, a national organisation, an international organisation not listed in Article 1 or a firm, may arrange for payment to the Organisation in accordance with the Implementing Rules hereto, of any amounts corresponding to the retirement pension rights accrued under his previous pension scheme, provided that that scheme allows such transfers to be made.

> In such cases the Office shall determine, by reference to his grade on confirmation of appointment and to the Implementing Rules hereto, the number of years of reckonable service with which he shall be credited under its own pension scheme."

12. The Tribunal notes that the use of the singular in the reference to a "previous pension scheme" is not accidental.

13. Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations deals with the manner in which the years of service are calculated:

> "i) Periods of membership of previous pension schemes
>
> a) Pursuant to Article 12, paragraph 1, of the Regulations, years of reckonable service shall be credited in accordance with these Rules in respect of periods of membership of pension schemes preceding entry into the service of the Office.
>
> Such periods of membership may include periods served in one or more government departments, organisations or firms, provided that the aggregate of such rights had been taken into account under the pension scheme of the last government department, organisation or firm in whose service the person concerned was employed before entering the service of the Office. [emphasis added.]
>
> b) An amount shall be credited under this Article only if it is certified by the previous pension scheme as being the actuarial equivalent of retirement pension rights or as representing a capital payment in respect of rights to a pension or of social security entitlements (excluding compensation for dismissal or a severance grant) and must be equivalent to the whole of the amounts paid to the person concerned by the afore-mentioned pension scheme."

14. As stated above, the EPO and the Federal Republic of Germany entered into an Agreement on the implementation of Article 12 of the Office's Pension Scheme Regulations. Article 1(1) of this Agreement reads as follows:

> "A permanent employee or member of the contract staff of the European Patent Office who has been compulsorily or voluntarily insured with the German social security pension insurance scheme shall be entitled to have transferred to the pension scheme of the European Patent Office the total compulsory and voluntary contributions paid in respect of him to an authority responsible for the social security pension insurance scheme in the Federal Republic of Germany up until the time of his entry into the service of the European Patent Office, taking into account where appropriate any pension adjustment, together with 3.5 per cent interest for each complete year following the contribution payment until the time of the transfer. The transfer shall be effected on

> application by the person entitled; it may also be applied for by his survivors. Such application is to be made to the European Patent Office within six months from the appointment of the employee on a permanent basis or, in the case of a member of the contract staff, within six months from the date on which he acquires a right to a retirement pension. That period shall not expire earlier than six months after the entry into force of this Agreement. The European Patent Office shall notify the Federal Insurance Office for Salaried Employees, which shall, where appropriate, pass the application on to the competent authority responsible for the pension scheme. An application may not be withdrawn once the applicant has accepted in writing the proposal made by the European Patent Office regarding the extent of the period of service to be credited."

15. In the present case, it is agreed that prior to his transfer to the EPO, the complainant was compulsorily affiliated to the civil servants' pension scheme. He had ceased to contribute to the BfA scheme for approximately fifteen months. Article 12 of the Office's Pension Scheme Regulations makes it quite clear that the only rights that can be transferred are the ones acquired under the previous pension scheme, provided it does not prevent the transfer. The complainant's previous pension scheme at the time of his secondment was the civil servants' pension scheme. It is established that German law prevents the transfer of the rights acquired under that pension scheme. The above provisions make it quite clear that the complainant's rights under the BfA scheme cannot be transferred.

16. The complainant can draw no comfort from any apparent ambiguity in the terms of the quoted passage of the Agreement: even if it could bear the meaning which the complainant contends for it, which it does not, it could not override the clear terms of the statutory provisions to which it is ancillary.

17. The impugned decision is accordingly well-founded and the complaint must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

**In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

Michel Gentot

MICHEL GENTOT

JAMES K. HUGESSEN

Flerida Ruth P. Romero

FLERIDA ROMERO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

*Registry's translation, the French text alone being authoritative.*

# NINETIETH SESSION

**In re Aboukrat (No. 2)** **Judgment No. 2013**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms Michèle Aboukrat against the World Health Organization (WHO) on 22 January 2000 and corrected on 1 March, the WHO's reply of 26 May, the complainant's rejoinder of 26 June and the Organization's surrejoinder of 26 September 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French national who was born in 1946, joined the Interim Commission for the International Trade Organization/General Agreement on Tariffs and Trade (ICITO/GATT) on 6 February 1974. On 19 May 1980 she was transferred to the WHO as a supply assistant at grade G.6 in the supplies unit of the Personnel and General Services Division. On 1 March 1985, following the reclassification of her post, she was promoted to grade G.7. By a letter of 25 January 1994 the Director of the Division of Personnel informed her that, in view of her twenty years of service, she would be given two extra within-grade steps as of 1 February 1994.

On 1 March 1999 the complainant applied for a one step increase for her twenty-five years of service under the terms of Staff Rule 555.2, which provides that a staff member whose service with the Organization commenced prior to 1 March 1993 may qualify, with effect from 1 February 1994, for only one increase during the remaining service. Her application was rejected in a memorandum of 16 March 1999 on the grounds that she had been given two extra steps on 1 February 1994 and so was no longer eligible for a further increase. She applied again on 22 March 1999, but her application was again rejected by a memorandum of 12 April. The complainant appealed to the Headquarters Board of Appeal, which recommended in its report of 25 September that the Director-General should dismiss her appeal. By a letter of 21 October 1999, which is the impugned decision, the Director-General endorsed the Board's recommendation.

B. The complainant contends that, since she was granted the within-grade step increase with effect from 1 February 1994, she had completed twenty years of service on 31 January 1994. Moreover, Rule 555.2 provides that the increase shall be granted upon completion of the required period of service "after 1 February 1994". She alleges that the WHO gave the staff contradictory information between April 1993 and March 1994 and adds that the wording of Staff Rules 555.1 and 555.2 is unclear. She notes that the report of the Forty-sixth World Health Assembly, held in May 1993, did not indicate the date on which the amendments to the Staff Rules would apply with regard to long-service step increases.

The complainant asks the Tribunal to set aside the impugned decision, find that she is entitled to long-service step increases and send the case back to the Organization for a new decision.

C. In its reply the WHO submits that the complainant, who was recruited on 6 February 1974, completed her twenty years of service on 5 February 1994, that is after the deadline of 1 February 1994 laid down in Staff Rule 555.2. That she was told of the step increase by a letter of 25 January 1994 in no way alters that fact. Moreover, she was granted the increase as of 1 February because, in accordance with the provisions in force, such a decision comes into effect on the first of the month nearest the date of completion of the service requirement. The WHO observes that the complainant does not explain in what way the information is contradictory. It adds that the World Health Assembly need not indicate the date on which an amendment to the Staff Rules comes into effect for it to be valid: responsibility for implementing the amendment lies with the Director-General. Lastly, it sees nothing confusing in the wording of Staff Rules 555.1 and 555.2.

D. In her rejoinder the complainant contends that, since she received a step increase on 1 February 1994, the date of her entry into service is no longer relevant in determining the length of her service. She pleads an acquired right to an extra increase under the transitional measures provided for in a resolution of the World Health Assembly and she criticises the Director-General for not amending the Staff Rules in accordance with this resolution.

The complainant changes her claims. She asks the Tribunal "to find that she is still covered by the April 1993 wording of Staff Rules 555.1 and 555.2" and to send the case back to the Organization for a new decision, or else to determine the increase she should have been granted.

E. In its surrejoinder the WHO explains that it is impossible to determine an official's period of service without referring to the date of entry into service. It adds that the complainant never challenged that date and she is no longer entitled to do so. The WHO says that it did introduce a transitional measure in the Staff Rules: a staff member recruited prior to 1 March 1993 may qualify for a single step increase, whereas staff recruited after that date do not. It denies that the complainant has an acquired right to an extra increase; indeed the World Health Assembly resolution states precisely the opposite. Furthermore, eligibility for more than one step increase does not constitute an acquired right within the meaning of the case law.

## CONSIDERATIONS

1. By a memorandum of 15 February 1994 the staff of the WHO was informed of the amendment of the Staff Rules with effect from 1 February 1994, and particularly of Staff Rules 550.1, 555.1 and 555.2, the previous version of which provided for the granting, under certain conditions, of extra step increases known as "meritorious increases" or "long-service increases". As the Tribunal found in Judgment 1446 (*in re* Agoncillo and others), this amendment removed additional steps which did not exist in other organisations of the United Nations common system, the aim being to harmonise the pay system, while at the same time including a transitional rule for staff members who entered the WHO's service before 1 March 1993.

The former version of Rule 555 read as follows:

> "555. MERITORIOUS WITHIN-GRADE INCREASE
>
> 555.1 A staff member whose performance has been especially meritorious beyond that which may reasonably be expected of a normally well-qualified staff member, may be granted one, or exceptionally two, extra within-grade steps. Such increase shall not affect the staff member's eligibility for normal within-grade increases, and the normal maximum shall be extended by the equivalent number of steps.
>
> 555.2 A staff member who has completed 20, 25 and 30 years of satisfactory service with the Organization qualifies for a meritorious increase under Rule 555.1. Satisfactory service with other United Nations organizations shall be included if credited under Rule 480.1.4."

The new version of Rule 555 is as follows:

> "555. MERITORIOUS WITHIN-GRADE INCREASE
>
> 555.1 A staff member whose performance has been especially meritorious beyond that which may reasonably be expected of a normally well-qualified staff member, may be granted one, or exceptionally two, extra within-grade steps. Such increase shall not affect the staff member's eligibility for normal within-grade increases up to the normal maximum step in the grade.
>
> 555.2 A staff member whose service with the Organization commenced prior to 1 March 1993 shall qualify, with effect from 1 February 1994, for only one increase under Rule 555.1 during the remaining service in the Organization. Such increase shall be granted upon completion of either 20 or 25 or 30 years of satisfactory service, whichever occurs first after 1 February 1994. Satisfactory service with other United Nations organizations shall be included if credited under Rule 480.1.4."

2. The complainant, who was born on 4 June 1946 and is a French national, was employed by ICITO/GATT from 6 February 1974 to 19 May 1980, the date of her transfer to the WHO.

Following a short-term contract from 6 to 28 February 1974, the complainant was offered a permanent contract on 1 March 1974 with non-local status; this allowed her to benefit from an assignment grant for fifteen days.

All the documents issued by ICITO/GATT and by the WHO indicate 6 February 1974 as the day of her appointment.

By a letter of 25 January 1994 the Director of the Division of Personnel informed the complainant that, "in accordance with Staff Rule 555.2, [she would] be granted two extra within-grade steps from 1 February 1994 in view of [her] twenty years of service with the WHO".

On 1 March 1999 the complainant applied for another step increase under Staff Rule 555.2 for the completion of twenty-five years of service, deeming that she had completed this period of service on 1 February 1999. Her application was rejected and she appealed to the Headquarters Board of Appeal. On 21 October 1999 the Director-General, following the recommendation of the Board, dismissed her appeal. That is the impugned decision.

The complainant asks the Tribunal to quash the decision of 21 October 1999, find that she is entitled to a further step increase for twenty-five years of service and send the case back to the Organization for a new decision.

The WHO requests that the complaint be dismissed.

3. The complainant's main contention is that, for the reasons discussed below, the increase that she was granted with effect from 1 February 1994 covered a period of service completed before the deadline of 1 February 1994 and the increase was due to her under the former provisions, with the result that she could claim extra steps for the completion of twenty-five years of service under the new version of Rule 555.2. In support of her interpretation of the rules, or in her subsidiary argument, she pleads protection of her acquired rights to this benefit and the rule against retroactivity.

The WHO rejects this argument.

4.(a) The complainant contends that the increase she was granted for her twenty years of service was for the period prior to 1 February 1994, because it was granted to her before that date by the letter of 25 January 1994.

The WHO rightly retorts that, in view of its nature, the decision to award the increase announced in the letter of 25 January 1994 was effective, under the terms of Staff Rule 380.3.1, cited below, only on "the first of the month nearest the date of satisfactory completion of the service requirement", that is 1 February 1994, based on the conditions applying at the time.

(b) The complainant also appears to contend that, as the extra steps were granted with effect from 1 February 1994, it necessarily follows that the qualifying conditions had already been met by 31 January 1994, when the former rules were still applicable. But her argument is not convincing.

Under the terms of Staff Rule 380.3.1, second sentence, which she herself cites,

> "The date of entitlement to a within-grade increase shall be the first of the month nearest the date of satisfactory completion of the service requirement."

The granting of the extra step increases with effect from 1 February 1994 could therefore stem from the application of this Rule, and does not in any way prevent the determinative date of the complainant's initial appointment from being 6 February 1974 and the period of twenty years of service from being completed on 5 February 1994.

(c) The complainant appears to be arguing that, since the extra step increases granted in 1994 were effective on 1 February 1994, this would mean, under the terms of amended Staff Rule 555.2, that she did not complete her twenty years of service "after 1 February 1994", but before, or on that date, so the increase was covered by the earlier provisions.

This argument once again confuses the date on which the twenty, twenty-five or thirty years of service are actually completed and the effective date of the increase.

(d) In the internal procedure, the complainant also endeavoured to show that the determinative date of her initial appointment was not

6 February 1974, but fifteen days earlier since on her appointment she obtained an assignment grant for fifteen days. She quotes Staff Rule 450.1, which reads as follows:

> "The effective date of appointment shall be the date the staff member reports for duty if locally recruited. If travel is authorized it shall be the date he enters travel status, provided that this date is not earlier than that required for travel by the route and type of transport designated by the Organization."

In this case, the complainant was resident in Geneva at the time of her appointment, as indicated in the document issued by ICITO/GATT awarding her a fixed-term contract, so she did not have to travel to report for duty. The Headquarters Board of Appeal agreed with the Organization that the assignment grant merely represented a contribution to expenses, and did not affect the original date of her appointment.

She has not retained this argument before the Tribunal. In any case, she has not demonstrated that the original date of her appointment was wrongly determined by ICITO/GATT and then the WHO.

5. The amendment to Staff Rule 555.1 does not violate any general principles of law.

(a) The Tribunal already found in Judgment 1446 that this amendment was not in breach of the acquired rights of complainants who, under the former rules, could have qualified for extra step increases after twenty, twenty-five and thirty years of service. The arguments put forward by the complainant cannot make the Tribunal depart from precedents.

(b) Nor was there breach of the principle that rules which are unfavourable to the person concerned shall not be given retroactive effect. In fact, the new rule was applicable only to facts occurring after it came into force and did not therefore prejudice entitlement to extra step increases for which the conditions had already been met.

6. Having already been granted in 1994 the single increase provided by the transitional provision of the new Staff Rule 555.2, the complainant cannot be granted another one under that same rule.

7. All her pleas are therefore devoid of merit.

# DECISION

**For the above reasons,**

**The complaint is dismissed.**

**In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

*(Signed)*

**Michel Gentot** **Jean-François Egli** **Seydou Ba**

**Catherine Comtet**

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

# NINETIETH SESSION

***In re* Fraquelli** **Judgment No. 2014**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Italo Danilo Coitinho Fraquelli against the United Nations Industrial Development Organization (UNIDO) on 20 November 1998 and corrected on 17 March 1999, UNIDO's reply of 23 June, the complainant's rejoinder of 23 October and the Organization's surrejoinder of 16 December 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Brazilian national born in November 1939, joined the staff of UNIDO in 1989 under a one-year contract as a chief technical adviser in Maputo, Mozambique. From 1990 he had a series of fixed-term appointments. In April 1991 he became UNIDO's Country Director (UCD) for Mozambique and Swaziland, at grade L5, and subsequently took over responsibility for Angola and Lesotho as well, but remained stationed at the UCD office in Maputo. On 1 May 1996 his contract was extended to 31 December 1997.

An internal audit and inspection of the office in Maputo took place in the first week of September 1996. On 8 October the complainant received a fax from UNIDO headquarters summoning him to Vienna for further consultation on the results of the audit. On 14 October, after his arrival in Vienna, he received a draft copy of the internal auditors' report – No. 13/96 – and was given until the following day to prepare his comments on it. The report criticised aspects of his management of the office in Maputo, particularly his use of the official car for private purposes and of the Organization's resources to promote businesses run by his family. He submitted his comments as required and, on 16 October 1996, was sent a final copy of the auditors' report – No. 14/96 – which maintained all the allegations against him and further mentioned that he had removed one of the computers from the office in Maputo and used it in his home for several months prior to the inspection. In a covering letter, sent with the report, the Director of Personnel Services informed the complainant that he was relieved of his duties as Country Director, with immediate effect, and was to remain in Vienna until further notice. He was stationed in Vienna for the next five months.

At a meeting with the complainant in mid-November 1996 the Director warned him that disciplinary proceedings could ensue. He was offered the opportunity to resign but did not take up that option. On 28 November the Administration referred the matter to the Joint Disciplinary Committee and gave him until 12 December 1996 to prepare a statement in his defence. He complied and the Committee heard him on 15, 16 and 17 January 1997.

The Committee's report, dated 20 January 1997, listed five charges that were brought against the complainant: (1) a degree of involvement in family business that was incompatible with his duties at UNIDO; (2) unauthorised use of the official car; (3) unauthorised removal and use of a UNIDO computer; (4) acceptance of remuneration for non-official work; and (5) the use of his official position to further private interests. The Committee recommended that the complainant be dismissed for misconduct and "failure to meet the highest standards of integrity" and that no termination indemnity should be paid to him. In a letter of 31 January 1997 the Director of Personnel Services informed the complainant that the Director-General had endorsed the Committee's recommendation and he would therefore be dismissed with effect from the following day. He also told the complainant that a sum of 13,920 United States dollars would be deducted from other amounts due to him to cover his private use of the official car.

The complainant appealed to the Joint Appeals Board on 27 February 1997. It issued its report on 16 July 1998. The Board dismissed one of the five charges brought against him, and upheld the two charges relating to the use of the car and removal of the UNIDO computer. It found "valid" although "insufficiently documented" the two remaining charges relating to his involvement in family business and use of his official position, but it too concluded that the complainant should be released from his duties. It was of the opinion, however, that there were mitigating circumstances inasmuch as the complainant had not been adequately supervised in his role as Country Director and there was limited evidence to support the charges. It recommended that UNIDO pay him the maximum amount of termination indemnity to which he was entitled, which would be 50 per cent of the normal termination indemnity. In a letter of 17 August 1998 to the alternate secretary of the Appeals Board the Director-General maintained the decision to dismiss the complainant but made payment of the indemnity conditional on his agreeing that it was in settlement of all his claims against UNIDO. That decision, which the complainant is now challenging, was notified to him on 24 August.

The complainant chose not to accept the offer and raised the question of a negotiated settlement. On 23 September 1998 he submitted his terms for a settlement to the Special Advisor to the Director-General. The Director-General did not agree to them and upheld his decision of 17 August 1998.

B. The complainant submits that the impugned decision is unlawful. He contends that the report of the Joint Appeals Board was flawed on two counts.

First, there was breach of due process. His ability to defend himself was impaired because he did not see all the documentary evidence on which the charges were based. From January to June 1996 a Junior Professional Officer (JPO) had worked under his supervision in Maputo. Unbeknown to him, that official had produced a confidential report about the functioning of the office and sent it to UNIDO headquarters before leaving Mozambique in early July. It was a crucial document in the context of his case because it triggered the inspection by the internal audit team in September 1996. UNIDO'S subsequent accusations against him were therefore based on a confidential report that, in spite of his requests, he had never seen, and the Board failed to take that into account. UNIDO "detained" him in Vienna against his wishes, removed the hard disk from the computer used by him in Maputo, and prevented him from having access to sources of information in Mozambique which he needed to consult in order to prepare his defence. Furthermore, he maintains that neither the Joint Disciplinary Committee nor the Joint Appeals Board took any notice of the long letter, dated 6 November 1996, which he wrote to the auditors in his defence with regard to the use of the official car and the storage at his home of the computer which he had removed from the office in Maputo.

In addition, the accusations against him were founded on hearsay and rumours. In its report the Joint Appeals Board admitted that the evidence against him in the internal audit report was weak and that the auditors had relied primarily on "testimonial evidence which was not made available to the Board in its original form". The Board had, therefore, gathered more evidence from selected staff members. Citing the Tribunal's case law, the complainant says that, because there was no convincing proof of the charges against him, he should have been given the benefit of the doubt.

Second, there was breach of the principle of proportionality. Two charges brought against him were recognised by the Board in its conclusions as being insufficiently documented and the sanction of dismissal was, therefore, disproportionate to his alleged misconduct.

The complainant submits that, because of all of the foregoing, the report and recommendation of the Joint Appeals Board cannot stand, nor therefore can the Director-General's decision of 17 August 1998 confirming his dismissal in February 1997.

He seeks: (1) the quashing of the impugned decision; (2) a confidential letter of apology from UNIDO; (3) an official letter of recommendation to be kept on his personal file and used in the future by UNIDO to the exclusion of any other written or oral recommendations; (4) the removal from his personal file at UNIDO headquarters of everything related to this case except the letter of recommendation; (5) retroactive reinstatement or an award of material damages equal to the amounts he would normally have received between the date of his dismissal and November 1999 (when he attained the age of 60), by way of salary, post adjustments, UNIDO's "subsidy payments" towards his pension, health insurance and life insurance and all other emoluments linked to his post as Country Director or his family situation; (6) an award for "grave moral damages" equal to five years' salary including post adjustments; (7) payment of the sum of 13,920 dollars which UNIDO deducted from the amount it paid him on dismissal; (8) payment of the sum of 10,000 dollars for "financial costs" incurred between October 1996 and February 1997 while he was in Vienna, particularly for three return journeys to Mozambique and phone calls to Maputo; and (9) a further 10,000 dollars in legal costs.

C. In its reply the Organization rejects the complainant's allegation that he was "detained" in Vienna while it was investigating his case. On the basis of Staff Regulation 4.1 he was assigned to Vienna by the Director-General where his presence was necessary because of the investigation. He received salary and a daily subsistence allowance and kept normal office hours. Facilities were made available to him so that he could prepare his defence; he was also authorised to go to Mozambique from 16 December 1996 to 8 January 1997.

The fact that the complainant did not see a report by the JPO assigned to Maputo did not constitute breach of due process. The report did not form part of the documentary evidence on which the charges against him were based; nor was it ever put in his personal file. The charges brought against him were based on the findings of the internal audit team. The Organization also holds that it had a legitimate right to remove the hard disk from the computer the complainant had used in Maputo. Financial Rule 109.39 provides for "unrestricted access to all records" in the context of an internal audit. The complainant was also allowed access to information on the hard disk in question but he did not make full use of the opportunity he was given.

It is clear from their reports that the Joint Disciplinary Committee and the Joint Appeals Board carefully considered the evidence at their disposal. There is no foundation for the complainant's allegation that they did not take account of his defence. UNIDO maintains that the Director-General took the decision to dismiss the complainant on the basis of those charges which the Joint Appeals Board had upheld. In so doing he properly exercised his discretionary power and did not infringe the principle of proportionality.

D. In his rejoinder the complainant says that the case 'built up' against him had nothing to do with the way he managed the UCD office. Had there been any truth underlying any of the charges his immediate supervisor, the Resident Representative of the United Nations Development Programme, would have raised the issues with him long ago and his contract would not have been extended.

He maintains his view that UNIDO denied him access to the facilities he needed in order to prepare his defence. His statement had to be completed by 12 December 1996: it was only after that date that he was authorised to go to Mozambique. On the matter of his defence he also says that, during the week the auditors were in Maputo, they contacted people whose existence they could only have learnt about from the JPO's confidential report. He therefore repeats his assertion that there was breach of due process as his case was built on that officer's report and he still has not seen a copy of it. On 13 November 1996 the former Director-General acknowledged the existence of the report and said a copy would be made available to him the following day. He wants the Tribunal to hear the former Director-General as a witness as he could testify on matters regarding the report.

E. In its surrejoinder the Organization makes it clear that the complainant was not deprived of his right to be heard at any level. While he was in Vienna he was offered the opportunity to take time off to prepare his defence. It was only on 9 December that he requested annual leave to go to Mozambique later in December.

As both the draft version and the final version of the audit reports made clear, the audit was conducted at the request of the Director-General "as part of the on-going management audits of UNIDO field offices". It points out that the audit team did not receive a copy of the JPO's report.

## CONSIDERATIONS

1. The complainant was appointed UNIDO Country Director (UCD) in Maputo (Mozambique) on 1 April 1991.

2. An internal audit and inspection of the UCD office in Maputo was carried out from 2 to 6 September 1996 by the internal audit section of the Organization. It produced a draft report – No. 13/96 – dated 14 October which was shown to the complainant for comment, and then a final report – No. 14/96 – dated 15 October. Its report criticised the management of the UCD office and said that the complainant had failed to meet the highest standards of integrity and conduct referred to in the Staff Rules and Regulations by using the official car for unofficial purposes and the Organization's resources to promote his family's business interests during working hours and by accepting outside activities against remuneration.

3. On 8 October 1996 UNIDO summoned the complainant to Vienna. By a memorandum dated 16 October he was relieved of his duties as UCD in Mozambique with immediate effect and asked to remain at headquarters and report to the Officer-in-Charge of the Country Programmes and Funds Mobilization Division.

4. Following an exchange of correspondence, the Director of Personnel Services informed the complainant on 28 November 1996 of five charges against him amounting to "unsatisfactory conduct requiring dismissal". He pointed out that the Director-General had authorised him to submit the matter to the Joint Disciplinary Committee in accordance with Article XI of the Staff Regulations and Chapter XI of the Staff Rules.

5. On 29 November the complainant asked for access to information which he needed for his defence. In particular, he requested a copy of the report prepared by a JPO who had worked in Maputo, which he claimed was "the origin" of his problems, and also a copy of all the contents of the hard disk of the computer he had used in Maputo.

6. The Organization told him on 2 December 1996 that it had never officially received a report from the JPO, that the charges were not based on such a report nor did such a report form part of the evidence. It also said the hard disk was UNIDO property and he was not entitled to have a full copy of it, but he would nonetheless be granted supervised access to it.

7. The Joint Disciplinary Committee issued a report on 20 January 1997 and recommended dismissing the complainant with no termination indemnity. On 31 January 1997 the complainant was notified that the Director-General had decided to dismiss him, with effect from 1 February 1997. He appealed against that decision to the Joint Appeals Board which reported on 16 July 1998. It recommended dismissal but with payment of 50 per cent of the normal termination indemnity, the maximum allowed by the rules on separation for disciplinary reasons.

8. On 17 August 1998 the complainant was informed that the Director-General had decided to maintain his decision to dismiss him but would agree to the payment of 50 per cent of normal termination indemnity on condition that it would be in settlement of all his claims against UNIDO and that he would not appeal against the decision. This is the decision impugned.

9. Five accusations were made originally against the complainant:

(1) By his involvement in family business he had engaged in activities that were incompatible with the proper discharge of his duties with UNIDO.
(2) Unauthorised use of the official car for private purposes.
(3) Unauthorised removal of a computer and use of it at home.
(4) Unauthorised acceptance of remuneration for non-official work performed either during or outside office hours.
(5) Use of his official position to facilitate private interests.

10. The Joint Disciplinary Committee stated that, based on the documents before it as well as written and oral statements, it had established that:

(1) There was extensive involvement of the complainant in family business.

(2) The official car was regularly used for his own and his family's transport.

(3) There had been unauthorised removal of an office computer but it could not verify that it had been used at his home.

(4) The charge of unauthorised acceptance of remuneration for non-official work was not established.

(5) There was strong evidence of the complainant's use of his position and inside knowledge of UNIDO to facilitate the private interests of his son.

11. When the matter came before the Joint Appeals Board on appeal, the Board made a number of findings. In its report it said that "the body of tangible evidence ... was rather shallow". The Board found that much of the disciplinary proceedings had relied on the auditors' report and that the accusations in that report were based on testimonial evidence which was not made available to the Board in its original form in view of its confidential nature. The report also said that, taken individually, the charges did not warrant the severity of the action taken against him. Taken together, however, they would appear to betray a character flaw. So the Board interviewed (pursuant to Appendix K(q) of the Staff Rules) selected staff members to build "a fair and ... objective picture of the [complainant's] personality".

The Board analysed the charges and evidence underpinning the disciplinary action.

(a) Concerning his involvement in family business: while not considering that keeping data on a UNIDO computer was proof of inappropriate conduct *per se* and making allowance for the variation across different cultures of the extent of family obligations, the Board found the complainant's behaviour in this respect excessive.

(b) As regards his use of the official car: the Board found that the accusation was convincingly documented by the auditors.

(c) As regards the removal of the computer and the use of it at home: although its removal was not contested by the complainant, the Board did not consider the complainant's justification for his action to be fully convincing. (It did not deal with its use, which, in any event, the Joint Disciplinary Committee did not find proved.)

(d) The Joint Appeals Board did not consider the accusation about remuneration for non-official work as it was dropped by the Joint Disciplinary Committee.

(e) Concerning the use of his official position to facilitate private interests, the Board said that the auditors' report was very vague on this subject and relied on testimonial evidence which it described as "poorly documented accusations [that] were disputed by the [complainant]".

12. The Joint Appeals Board found that the evidence contained in the draft internal auditors' report was insufficient to warrant disciplinary action. It, accordingly, attempted to complement the information available in the file by extensive interviews with a number of staff members who had interacted in some capacity or other with the complainant. The Board then referred to the evidence of the staff members interviewed who confirmed having heard rumours in Maputo "about the complainant's behaviour".

13. The interviews also dealt with the complainant's professional behaviour. In answer to the complainant's excuse that he had never had a proper briefing before taking up his position, the Board took the view that he "lacked discernment on behavioural issues" and had "failed to exercise sensible judgment on procedural and administrative matters".

14. In its conclusions the Board upheld, in view of "convincing evidence", the charges of unauthorised use of an official vehicle and unauthorised removal from the office of a computer. It dismissed the charge of unauthorised acceptance of remuneration for non-official work and found "valid, though insufficiently documented", the charges of involvement in family business and use of his official position to facilitate private interests.

15. The Joint Appeals Board agreed with the conclusion of the Joint Disciplinary Committee that the complainant had failed to meet the

standards of conduct expected of an international civil servant and should be relieved of his duties. However, it considered that the severity of the disciplinary action should be reduced in view of the limited evidence advanced to support the charges and because he had not been adequately supervised during the five years preceding the action taken against him. The Board, therefore, recommended rejecting the appeal but paying the complainant 50 per cent of the normal termination indemnity.

16. The arguments which the complainant puts forward fall under two broad heads: breach of due process of law and lack of proportionality.

Under the heading of breach of due process of law he submits that:

(a) He was never given a copy of the JPO's report which was the source of his troubles.

(b) He was denied access to his sources of information in Mozambique when preparing his answers to the auditors' report.

(c) The Joint Disciplinary Committee had made its mind up that he was guilty before he sent in his written statement on 12 December. They met on 3, 4, 6 and 9 December 1996 and on 14, 15, 16, 17 and 20 January 1997, the hearing being on 15, 16, and 17 January. Since they met four times before 12 December they were convinced of his guilt before he made his submissions.

(d) Confidential information given to the auditors was not shown to him, the Joint Disciplinary Committee or the Joint Appeals Board.

(e) The Committee and the Board disregarded his defence on the two minor charges regarding his use of the car and the storage at his home of the computer.

(f) The Board was so in doubt about the two other charges upheld against him that it considered as "alleviating circumstances" the limited evidence produced to support them.

(g) There were contradictions in the Board's report, such as: the reference to "the body of tangible evidence" being "shallow"; that, individually, the charges did not warrant the severity of the action; that the auditors' report was very vague regarding the use of his official position to facilitate private interests; that the accusations were poorly documented; and that the evidence in the internal auditors' report was insufficient to warrant disciplinary action. He claims the Board should have stopped there in its investigation because of lack of sufficient proof.

(h) Lack of evidence cannot be construed as "alleviating circumstances" and that the benefit of the doubt, if it exists, must be given to the accused staff member.

(i) Although he does not complain about the fact that the Board interviewed selected staff members under Appendix K(q) of the Staff Rules, he does complain that it admitted hearsay (i.e. rumours) and that it raised the issue of professional performance which was not relevant.

With regard to the principle of proportionality, the complainant submits that, according to the rule of proportionality, there must be some reasonable connection between the offence and punishment, particularly when an official is dismissed on disciplinary grounds. According to Judgment 203 (*in re* Ferrecchia) breach of that principle is an error of law.

17. The Tribunal holds:

(a) The report of the JPO referred to by the complainant, which the Organization says it never officially received, never formed part of the case against him and was therefore irrelevant. The case was based on the report from the internal audit section. The complainant was not entitled to the production of any irrelevant documents.

(b) The complainant was given the facility of accessing the hard disk of the office computer under supervision which he partially exercised and then gave up without sufficient reason.

(c) The findings of the Joint Disciplinary Committee were replaced by those of the Joint Appeals Board but the complainant's allegation against the Joint Disciplinary Committee cannot be ignored. It is disrespectful to the members of that Committee to allege that they had made their minds up before considering his submissions. They were perfectly entitled to meet and discuss their business as they thought fit and there is no substance to the complainant's allegation.

(d) It is true that confidential information given to the auditors was not made known to him, the Joint Disciplinary Committee or the Joint Appeals Board. This puts that evidence in the realm of unsubstantiated hearsay which should not have been relied on. It is contrary to due process to require an accused staff member to answer unsubstantiated allegations made by unknown persons. The staff member is entitled to confront his or her accusers. In the present case, if the Organization was not willing to disclose the identity of the complainant's accusers, and had no other independent evidence to rely on, the charges should not have been brought.

(e) There is no evidence that the Joint Disciplinary Committee or the Joint Appeals Board disregarded his defence concerning the unauthorised use of the official car and the removal of a computer. Both bodies were entitled to weigh his defence against the case made by the Organization and find him guilty if there was admissible evidence on which such a finding could be made. In respect of these two charges there was evidence on which a finding of guilty could be based.

(f) to (i) The Joint Appeals Board's report contains a number of contradictions. Paragraph 35 says that the evidence contained in the internal audit report was insufficient to warrant disciplinary action, yet paragraph 30 says the Board found the complainant's involvement in family business to be excessive. Paragraph 31, referring to his use of the official car, says that the Board felt that this accusation was "convincingly documented" by the auditors, whereas paragraph 32, regarding the removal of the office computer (not denied by the complainant), states that the Board did not consider the complainant's justification for his act to be "fully convincing". The Board said that it had attempted to complement the information in the file by extensive interviews with a number of staff members in order to build a picture of the complainant's personality. Appendix K(q) of the Staff Rules permits the Board "to call members of the Secretariat who may be able to provide information on the issues before it". The issue in this case was not the complainant's personality. The only reference in the Board's report to the evidence obtained from these interviews mentions confirmation of rumours about the complainant's behaviour, which was not admissible evidence, and his professional performance, which was not relevant to the charges. In view of the convincing evidence, the Board concluded by upholding the charges of unauthorised use of a UNIDO vehicle and of unauthorised removal from the office of a computer. It dismissed, for lack of evidence, the charge of unauthorised acceptance of remuneration for non-official work and found valid although "insufficiently documented" the charges of involvement in family business and the use of his official position to facilitate private interests. The Board adhered to the Joint Disciplinary Committee's conclusion that the complainant had failed to meet the standards of conduct expected from an international civil servant and should therefore be relieved of his duties in the interests of the Organization. However, it noted alleviating circumstances which it said ought to "mitigate the severity" of the disciplinary action. One of these was the limited evidence to support the charges.

Since the Joint Appeals Board had already said there was "convincing evidence" of the first two charges mentioned above but insufficient documentation of the second two charges, the Tribunal must assume that the reference to "limited evidence" refers to the last two charges.

18. The Tribunal considers that either there was sufficient admissible evidence of the guilt of the complainant as an accused staff member or there was not. If there was not enough admissible evidence to convince the person making a decision, the charge should have been dismissed; if there was enough such evidence, then there should have been a finding of guilty. What is not permissible is to take a stand somewhere between the two, which is what the Board did. The Board found the complainant guilty on two of the charges although the evidence was inadequate, and, because of limited evidence to support the charges, recommended mitigation.

19. The Board should not have embarked on an enquiry into the complainant's personality, which was not relevant. The issue was whether he did what he was accused of. Also, his professional activities in general were not at issue. The Board should not have relied on any evidence from unidentified sources in the auditors' report. The end result is that the Board's report cannot be relied on to justify its findings even as regards the

two minor charges (misuse of the official car and removal of an office computer).

20. In taking the decision which is now under challenge the Director-General gave no reasons himself. He did not say that he based his decision on the Board's report and recommendation. But he did follow its recommendation, with the additional provision that payment of 50 per cent of the normal termination indemnity was conditional on the complainant's not appealing against the decision. Assuming that he did rely on the Board's report, the Tribunal is satisfied that in view of the contradictory statements of the Board and the unorthodox way in which they conducted their enquiry, the complainant was not accorded due process and accordingly the impugned decision cannot stand.

21. In view of the disregard of the complainant's right to due process he is entitled to an award of damages for moral injury which the Tribunal sets at 1,000 United States dollars. He is also entitled to a sum of 1,000 dollars in costs. Since the decision is quashed, it follows that the complainant is entitled to his salary and emoluments until the date on which he would have retired in November 1999.

## DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The Organization shall pay the complainant arrears of salary and emoluments until the date on which he would have retired, in November 1999.
3. The Organization shall pay the complainant 1,000 United States dollars in compensation for moral injury.
4. It shall also pay him 1,000 dollars in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

**Organisation internationale du Travail**
***Tribunal administratif***

**International Labour Organization**
***Administrative Tribunal***

***Registry's translation,***
***the French text alone***
***being authoritative.***

# NINETIETH SESSION

***In re* Soltes (No. 3)** **Judgment No. 2015**

**THE ADMINISTRATIVE TRIBUNAL,**

**Considering the third complaint filed by Mr Dusan Soltes against the International Labour Organization (ILO) on 20 March 2000 and corrected on 6 April, the ILO's reply of 16 June, the complainant's rejoinder of 17 July, and the Organization's surrejoinder of 23 August 2000;**

**Considering Articles II, paragraph 2, and VII of the Statute of the Tribunal;**

**Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. Facts relevant to this case are set out under A in Judgment 1833 on the complainant's first and second complaints regarding the circumstances surrounding the termination of his contract.**

**Paragraph 23 (b) of Annex II (Compensation in event of illness, injury or death attributable to the performance of official duties) of the ILO Staff Regulations, states:**

> **"No claim for compensation under this Annex shall be considered unless it is submitted within six months of the injury, the manifestation and diagnosis of illness, or death, provided that where the Director-General is satisfied that a claim has been made at a later date for valid reasons it may be accepted for consideration."**

On 10 June 1997 and again on 10 October 1997 the complainant appealed against the termination of his contract. The rejection of these two internal complaints by a letter of 29 April 1998 led to Judgment 1833.

On 7 November 1997 the complainant submitted a claim to the ILO Compensation Committee for compensation for an illness. Finding that he had not clearly specified on the claim form the date of the onset of his illness nor the date it was diagnosed, the Compensation Secretariat wrote to the complainant on 27 January 1998 requesting further information as to the relevant date. Also, if the illness had been diagnosed more than six months prior to the submission, he was requested to explain why his claim should nevertheless be considered.

The complainant replied on 7 February 1998. He stated that on 26 August 1996 he had suffered from high blood pressure problems and had consulted a physician in Tripoli, Libya; he had then returned to Bratislava, Slovakia, for further treatment and diagnosis and in November 1996 he had received the results of his various medical examinations and tests; on 29 April 1997 a medical examination undertaken in the Joint Medical Service of the United Nations in Vienna at the ILO's request, by a doctor acting as a medical referee, confirmed the diagnosis and treatment the complainant had received in Slovakia. In the complainant's opinion it was not until 9 June 1997, the date on which he received the medical referee's report, that his illness was officially diagnosed by a United Nations-designated medical officer.

On 2 June 1999 the Compensation Secretary informed the complainant that the Compensation Committee had examined his claim. It had decided that "November 1996 could be considered as the starting point for the purposes of the statutory time limit for the submission of compensation claims, but 9 June 1997 ... could not" and it saw no valid reason to accept his claim. He was further informed that the Director-General had accepted the Committee's recommendation.

The complainant wrote to the Compensation Secretary on 28 July 1999 requesting a reversal of that decision. On 21 September 1999 the Director of the Personnel Department wrote to the complainant on the Director-General's behalf, confirming the decision not to accept his compensation claim. That is the impugned decision. The complainant received this letter on 15 January 2000.

B. The complainant argues that the Compensation Committee erred when it took November 1996 as the date on which his illness was diagnosed. The correct date is 9 June 1997, when he received notification of his diagnosis from a United Nations-designated medical officer. Therefore, the claim he submitted to the Compensation Committee on 7 November 1997 was within the six-month time limit.

In his complaint he asks the Tribunal to award him full pay up to 24 December 1996 and half pay from 25 December 1996 to 15 January 1997. He claims full pay from 16 January to 9 June 1997 on the grounds that the ILO kept him waiting for a medical examination by an independent medical referee. He further claims under Article 11.4.3 of the Staff Regulations compensation in lieu of notice of not less than six weeks at the rate prescribed in Article 3.1(d); compensation for six weeks' accrued annual leave; the refund of travel costs he incurred when he returned to Bratislava for medical treatment or a declaration that his journey to Bratislava should be treated as repatriation and his travel costs refunded; the refund of the costs of travel from Libya to Slovakia on 23 August 1996 for his wife and daughter; the balance of the education grant for his daughter for the school year 1996-97; the financial compensation he claimed from the Compensation Committee on 7 November 1997; moral damages; and any other compensation due to him under his original contract which has not yet been paid.

C. In its reply the Organization submits that the complaint is irreceivable. Although the complainant contends that he is impugning the decision concerning his compensation claim, nearly all his claims for relief were put before the Tribunal in his first and second complaints and were rejected in Judgment 1833. They are therefore *res judicata*. Moreover, his compensation claim is also irreceivable. It was not filed within the specified time limit and although the Director-General has the discretion to grant an extension, he refused to do so in the complainant's case. Such discretionary decisions are open to only limited review by the Tribunal. Furthermore, any diagnosis by a qualified physician starts the six-month time limit and there is no requirement that a diagnosis has to be made by a United Nations-designated physician.

D. In his rejoinder the complainant objects to the ILO's representation of the facts and presses his argument that his compensation claim was filed within the six-month time limit. He criticises the ILO medical officer's handling of the case.

E. In its surrejoinder the Organization contends that it has correctly applied the Staff Regulations. The Director-General was justified in denying him an extension of the time limit for filing the compensation claim. The Organization refutes the complainant's accusations concerning the ILO medical officer.

## CONSIDERATIONS

1. A national of Slovakia, the complainant joined the staff of the ILO in July 1996 under a one-year contract on a project funded by the Libyan Government. Posted to Tripoli, he was treated for high blood pressure from the month of August. On 24 September 1996 he returned to Bratislava. He subsequently obtained sick leave from 24 September to 23 November 1996, but objected that it was too short. He never returned to Tripoli. Following discussions with the Organization which are recounted in Judgment 1833 (*in re* Soltes Nos. 1 and 2), the Director of Personnel informed him on 20 May 1997 that the ILO was ending his contract and that he would receive one month's pay in lieu of notice, plus a termination indemnity. On 10 June and 10 October 1997, the complainant appealed under Article 13.2 of the Staff Regulations, challenging the conditions under which his contract had been terminated, making various financial claims and seeking compensation under Annex II of the Staff Regulations respecting compensation in the event of illness attributable to the performance of official duties. By a letter of 29 April 1998, the Director of the Personnel Department informed the complainant on the Director-General's behalf that most of his claims had been rejected; however, his compensation claim, lodged in November 1997 under Article 8.3 of the Staff Regulations, was being dealt with under a different procedure. On 2 June 1999, the

Compensation Secretary informed him that the Director-General had rejected his compensation claim on the basis of the recommendation of the Compensation Committee. The latter's conclusion was that, having been submitted more than six months after the diagnosis of the illness, the claim was outside the time-limit laid down in Article 23(b) of Annex II of the Staff Regulations. That decision was confirmed by a letter of 21 September 1999, which reached the complainant only on 15 January 2000.

2. In a complaint filed on 20 March 2000, the complainant asks for the decision of 21 September 1999 to be set aside and also puts forward numerous claims to elements of pay and indemnities which he says are due to him.

3. In its reply the ILO argues that the complaint is irreceivable on several counts. First, the decision contained in the letter of 29 April 1998 rejecting the complainant's internal complaints under Article 13.2 of the Staff Regulations has become final and can no longer be contested in a complaint filed on 20 March 2000. Furthermore, the compensation claim made under Article 8.3 of the Staff Regulations was filed over six months after the diagnosis of the illness suffered by the complainant. The Compensation Committee was therefore right to reject his claim as time-barred.

4. These objections to the receivability of the complaint must succeed.

5. First, the complainant's claims to elements of pay and indemnities to which he considers that he is entitled from the date of his sick leave until 30 June 1997, merely repeat the claims made to the ILO on 10 June and 10 October 1997. The ILO replied to them in a registered letter of 29 April 1998 which the complainant does not deny receiving; it was also attached to the Organization's reply in *in re* Soltes Nos. 1 and 2. The time limit of ninety days set in Article VII(2) of the Tribunal's Statute had therefore already expired by 20 March 2000, when the present complaint was filed.

6. Secondly, Article 8.3 of the ILO Staff Regulations provides that:

> "In the event of illness or injury attributable to the performance of official duties an official shall be entitled to compensation as prescribed in Annex II ..."

Article 23(b) of Annex II states that:

> "No claim for compensation under this Annex shall be considered unless it is submitted within six months of the injury, the manifestation and diagnosis of illness, or death, provided that where the Director-General is satisfied that a claim has been made at a later date for valid reasons it may be accepted for consideration."

7. When applying these provisions, the first question which arises is the date on which the illness became apparent and was diagnosed. According to the complainant, it was not until 9 June 1997 that he was informed of a diagnosis made by a United Nations-designated medical officer, so that is the date to be taken as starting the six-month period set in Annex II. According to the ILO, which points out that a diagnosis was made in August 1996 in Tripoli, it was in November 1996 at the latest that, as affirmed by the complainant himself, the results of medical examinations carried out in Bratislava established the diagnosis.

8. The Tribunal finds nothing in the dossier or the complainant's arguments to contradict the ILO's position. The diagnosis of high blood pressure was indisputably established by the examinations undertaken in November 1996 in Bratislava. The report of 5 May 1997 by a medical officer of the Joint Medical Service of the United Nations in Vienna entrusted with examining the complainant, specifying the duration of sick leave that he should be accorded, and indicating the date on which he could return to his duties in Tripoli, merely confirmed this diagnosis. Contrary to the complainant's assertions, it was not necessary to wait for an examination by a United Nations-designated physician to confirm a diagnosis already made in November 1996. The Compensation Committee rightly considered that the claim submitted on 7 November 1997 was outside the six-month period laid down in Article 23(b) of Annex II.

9. Admittedly, the Director-General had the authority to waive the time limit for the complainant if he was satisfied that the claim had been submitted at a later date for valid reasons. On the recommendation of the Compensation Committee, he did not consider it appropriate to do so, thereby exercising his power of discretion under conditions which show no

error of law or of fact, nor any obvious misappraisal of facts. There is no evidence to support the complainant's criticisms regarding the role of the ILO medical officer in the handling of the case.

10. The conclusion is that all the claims must fail.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT SEYDOU BA HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

***Registry's translation,***
***the French text alone***
***being authoritative.***

# NINETIETH SESSION

***In re* Banda (No. 2)**
**(Application for execution)**

**Judgment No. 2016**

**THE ADMINISTRATIVE TRIBUNAL,**

**Considering the application for the execution of Judgment 1872 filed by Mr Chemuta Divy Banda on 25 January 2000 and corrected on 23 March, the reply of the Organisation for the Prohibition of Chemical Weapons (OPCW) of 6 June, the complainant's rejoinder of 26 July and the Organisation's surrejoinder of 31 August 2000;**

**Considering Article II, paragraph 5, of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which neither party has applied for;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, a national of Cameroon who was born in 1946, was dismissed by the OPCW with effect from 16 December 1997. In Judgment 1872, delivered on 8 July 1999 on his first complaint, the Tribunal set aside that decision and decided, among other points: "The Organisation shall pay the complainant an amount equal to the salary and benefits that he would have received had he remained in service at his grade and step between the date of the termination of his appointment and 23 May 2000."**

**On 24 July 1999 the complainant, who had returned to live in Cameroon, wrote to the Director-General seeking execution of the**

judgment. By a letter of 14 September, the Head of the Human Resources Branch informed the complainant of the amounts that would be paid to him under various heads. He indicated that home leave and education grant benefits were paid on the basis of costs actually claimed and attached the appropriate claim forms. On 21 October 1999 the complainant sent in to the Human Resources Branch the claim forms for education grant benefits for his five children for the school years 1998-1999 and 1999-2000 and the home leave to which he would have been entitled in 1999. He stated that "the requests [for the education grant] are based on the total of the final settlement for the 1997/1998 school year". On 3 February 2000 the Organisation informed the complainant that it refused to pay the benefits requested.

On 4 April the complainant indicated that he had requested the schools in Cameroon and in England, in which his children were studying, to certify their attendance. However, he reiterated his position that the Organisation should reimburse him the education costs on the basis of the amounts paid for the 1997-1998 school year. In a letter of 27 April, the Head of the Human Resources Branch informed him that his education grant claims had been processed on the basis of actual costs and that the same would apply to his home leave claim. On 25 May 2000 he was paid the education grant benefits.

In the meantime, on 25 January 2000, the complainant had filed the present application with the Tribunal challenging the implied rejection of his settlement claim dated 21 October 1999.

B. The complainant recalls that the Tribunal decided in Judgment 1872 that he should be paid "an amount equal to the salary and benefits that he would have received had he remained in service". He asserts that he is claiming no more than that: had he remained in service, his children would have continued their schooling in the same schools as in the 1997-1998 school year and he and his family would have taken home leave in 1999. He asks the Tribunal to order the payment of the education grant for his children and home leave as if he had remained in service. He also claims 5,000 Dutch guilders in costs.

C. In its reply the OPCW argues that the application for execution has no basis in law and is consequently irreceivable. The education grant is paid on the basis of actual costs as certified by the school. "It cannot be some hypothetical amount of what the school costs might have been." Nothing in the decision of Judgment 1872 says that the qualifying conditions for the payment of that benefit did not have to be met. If the complainant's reasoning were to be accepted, the grant would no longer be for educational expenses, but would be more akin to damages. The OPCW says that the same applies to home leave: only the actual cost is reimbursable. Any other solution would be contrary not only to the rules in force but to the purpose of home leave. Once again, it would amount to paying damages. In support of its arguments, the OPCW cites Judgments 1588 (*in re* Tuffuor No. 2) and 1873 (*in re* Amira No. 2).

The OPCW adds that the complainant accepted the education grant payments that it had calculated on the basis of the claim forms he filled in; therefore, his application for review has become frivolous and should be dismissed.

D. In his rejoinder the complainant recognises that the amounts due to him must be based on actual costs, but he considers that these amounts cannot be lower than those he would have received had he remained in service. He explains that, although he allowed his children's schools to certify the school costs, he has always informed the OPCW of his view that it should pay him the grant on the basis of the costs for 1997-1998. He denies accepting the amounts calculated by the OPCW. He submits that his home leave travel claim was submitted in time and that lump-sum payment, which he opted for, is not based on actual costs. In his view, the amount awarded to him by the Tribunal in Judgment 1872 did include compensation for material and moral injuries. He adds that the context of the judgments cited by the OPCW was different from that of the present case.

E. In its surrejoinder the OPCW presses its pleas and reiterates its claims.

## CONSIDERATIONS

1. A former staff member of the Organisation for the Prohibition of Chemical Weapons (OPCW), the complainant, who is a national of Cameroon and currently lives in Yaoundé, was dismissed from his post as Head of the Human Resources Branch in conditions which were found to be unlawful by the Tribunal. In Judgment 1872, delivered on 8 July 1999, the OPCW was ordered to pay him an amount equal to the salary and benefits that he would have received had he remained in service between the date of the termination of his appointment and 23 May 2000. On 14 September 1999 the OPCW informed the complainant that 382,134.78 guilders were being transferred to his bank account and that amounts corresponding to his salaries and benefits for the period September 1999 to May 2000 would be paid monthly. As to education grant benefits for his children and home leave, it explained that payments could be made only on the basis of actual costs; he should therefore fill up the appropriate claim forms. The complainant did so and sent them in to the OPCW on 21 October 1999. He calculated his claim to payment of the education grant for his children on the basis of the amounts paid when he was still in the OPCW's service and living in the Netherlands, and his claim regarding home leave, on the basis of what he would have received had he remained in service. The OPCW agreed to take into account the actual costs indicated by the complainant for his children, whether they had continued their schooling in Cameroon or abroad, but refused to calculate the amount of the grant on the basis of the cost that would have been incurred had his children stayed in the schools they attended during the 1997-1998 school year. It also refused to pay him an allowance for the home leave that he had not actually taken, since he had returned to live in Cameroon after leaving the OPCW. The complainant is lodging an application for execution on these two points.

2. As emphasised by the OPCW, the applicable interim Staff Rules provide that the education grant is calculated on the basis of expenses actually incurred. The complainant cannot therefore claim grants calculated on the hypothetical basis of the costs that would have been incurred had he remained in service. As he is unable to prove that the

costs were actually incurred, the complainant cannot object to the favourable manner in which the OPCW responded to his claims on the basis of the certificates provided, for which it sent him two cheques on 25 May 2000 for 25,642.32 and 23,488.92 guilders, respectively.

3. The claim in respect of home leave cannot succeed as the complainant, who had returned to his country of origin and received the repatriation grant to which he was entitled, did not take any home leave. Any refund on this count would consequently be a fictitious amount, as found in Judgment 1588, and the OPCW therefore rightly considered that he was not entitled to that benefit.

4. The conclusion is that the OPCW executed Judgment 1872 properly. The application for execution therefore fails, there being no need to rule on the Organisation's objection to receivability.

## DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 9 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

*Registry's translation,*
*the French text alone*
*being authoritative.*

# NINETIETH SESSION

***In re* Toa Ba** **Judgment No. 2017**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Joseph Toa Ba against the World Health Organization (WHO) on 24 August 1999 and corrected on 28 March 2000, the WHO's reply of 5 July, the complainant's rejoinder of 10 August and the Organization's surrejoinder of 11 October 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a national of Côte d'Ivoire who was born in 1952, joined the WHO in the Bondoukou sub-sector in Côte d'Ivoire in October 1974 as a blackfly "collector" (blackfly are vectors of onchocerciasis) in the Onchocerciasis Control Programme. He remained in that job until May 1978, and was then employed as an equipment operator until 31 December 1992, when his post was abolished. As from 1 January 1993, he continued to work as an equipment operator under several special services agreements, the last of which ended on 31 December 1994.

In a communication of 5 August 1994, the complainant explained to the Director of the Joint Medical Service that he had contracted an illness "caused ... by onchocerciasis" during his service as a collector and claimed payment of his medical expenses. In the following months, he underwent various medical examinations. In a letter of 14 January 1998, the Director of the Programme informed him that the Advisory Committee on Compensation Claims had examined his case and concluded that it was unlikely that his eye problems were related to onchocerciasis. The results of the above examinations found a "weakening of eyesight due to an optic atrophy", the cause of which could not be determined. The Advisory Committee therefore recommended rejecting the complainant's claim and the Director-General endorsed that recommendation.

In a communication dated 23 February 1998, the complainant sent the Headquarters Board of Appeal a "statement of intention to appeal" seeking the re-examination of his claim to the payment of his medical expenses. In a letter of 4 March, the Secretary of the Board indicated that two remedies were available to him: he could either seek referral to a medical board if he intended to challenge the above recommendation on medical grounds, or appeal to the Headquarters Board of Appeal if he intended to claim breach of administrative rules. In the latter case, he should send the Secretary of the Board, before 14 April 1998, a statement of his intention to appeal, clearly indicating the rules which had been breached. In view of the difficulties encountered by the complainant, the Secretary suggested that he should contact the President of the Staff Association of the WHO's Regional Office for Africa. In a communication of 25 March, the complainant requested the latter to indicate the procedure to be followed. He repeated his request in a letter of 25 May. On 16 July he wrote to the Secretary of the Board of Appeal recounting his unsuccessful approaches to the President of the Association and again notifying his intention to appeal against the Advisory Committee's recommendation. The Administration of the WHO was advised on 27 July 1998 of this intention to appeal. The Board of Appeal submitted its report to the Director-General on 23 February 1999. It recommended the rejection of the appeal because it found no bias or failure of the Advisory Committee to examine the facts in full. Moreover, it found no mistake in the application of the Staff Rules and Regulations or the terms of the complainant's contract. The Director-General accepted the Board of Appeal's recommendation and so informed the complainant in a letter of 6 May 1999, which is the impugned decision.

B. The complainant considers that his illness is attributable to his activities as a collector. He believes that he has been subjected to "ingratitude" on the part of the WHO which cannot, in order merely to resolve the problem, "rid itself of a sick man because he is no longer in service".

The complainant also challenges the change in status which he underwent when his post was abolished on 31 December 1992. He emphasises that he then signed a special services agreement, involving a reduction in wages and a loss of all his former benefits, with the sole aim of obtaining the means to pay for his treatment.

The complainant claims compensation for the deterioration in his health and for loss of salary.

C. The Organization replies that the complaint is irreceivable and devoid of merit. If the complainant intended to appeal to the Headquarters Board of Appeal against the rejection of his claim that his eye problems were service-incurred, he should have filed his appeal within the statutory time-limits, that is "by 23 March 1998 at the latest". However, his statement of intention to appeal was not sent until 16 July 1998. Moreover, if he intended to challenge the medical findings, he should have requested the referral of his case to a medical board, which he did not do. In subsidiary pleas the WHO affirms that the correct procedure was followed for the examination of a compensation claim for an illness attributable to the performance of official duties. Indeed, under the terms of the WHO Manual, for an illness to be deemed service-incurred, there must be a direct link between the illness and the performance of those duties. According to the case law, the burden is on the complainant to prove service-incurred illness or, at the very least, the balance of probability that it is service-incurred must be in his favour. In the view of the WHO, this has not been demonstrated in the present case, as the evidence shows that there is little probability that the complainant's eye problems, consisting of an optic atrophy the cause of which cannot be determined, are related to onchocerciasis.

The WHO contends that any challenge to the special services agreements concluded by the complainant is not within the jurisdiction of the Tribunal under the terms of these agreements. In the first place, the agreements state that the signatory is a "contractor", who, not being considered a staff member, does not have the right to appeal to the Tribunal. The agreements also contain an arbitration clause which excludes any other remedy. Any claim concerning this type of agreement is therefore irreceivable. Furthermore, if the complainant intended to challenge one of the agreements, he should have appealed to the Regional Board of Appeal within the time limits. He did not do so and he is contesting them for the first time in his complaint to the Tribunal. Subsidiarily, the WHO explains that the complainant's appointment was ended "in strict conformity with the applicable rules" and that, having "freely consented" to the special services agreements which he is challenging, the complainant has no valid grounds for impugning them.

D. In his rejoinder the complainant submits that his complaint is receivable since the Headquarters Board of Appeal agreed to examine his internal appeal. He says that when he took up his job he was not suffering from any illness. As he worked for years in a field involving a risk of blindness, the WHO cannot refuse to take his eye problems into account. In this connection, he requests the Tribunal to order the production of the medical reports on his condition.

The complainant contends that the WHO should not have proposed special services agreements to an employee such as himself who had performed "high-risk work". He submits that its sole purpose in so doing, was to economise. He asks the Tribunal to recognise as "mitigating circumstances" the fact that he did not challenge the agreements in time.

E. In its surrejoinder the WHO presses its arguments. It says that the absence of illness on taking up duties affords no grounds for concluding that any subsequent illness is service-incurred. It adds that it will produce the complainant's medical reports if the Tribunal so wishes.

## CONSIDERATIONS

1. The complainant joined the WHO in October 1974 and was assigned to the Onchocerciasis Control Programme, where he was responsible for collecting the insects which are the vectors of that disease. In May 1978 he became an equipment operator. On 31 December 1992 his post was abolished but he continued to work as an equipment operator until 31 December 1994 under several special services agreements.

By a letter of 5 August 1994 the complainant informed the Director of the Joint Medical Service that he had contracted an illness "caused ... by onchocerciasis" and claimed payment of his medical expenses. The Director-General, following the opinion of the Advisory Committee on Compensation Claims, rejected his claim. The complainant was informed of that decision on 14 January 1998. On 23 February he sent the Headquarters Board of Appeal a statement of his intention to appeal against the decision. On 4 March the Secretary of the Board informed him of the remedies available to him: either a medical board, if he wished to challenge the Advisory Committee's recommendation on medical grounds, or the Headquarters Board of Appeal, if he intended to claim breach of administrative rules. After receiving this letter, the complainant sent a second notification of his intention to appeal to the Board on 16 July 1998. The Director-General, following the Board's recommendation, dismissed the internal appeal and so informed the complainant on 6 May 1999.

*On the special services agreements concluded in 1993 and 1994*

2. (a) Article II, paragraphs 1 and 5, of the Statute of the Tribunal limits its competence to disputes arising out of the relationship between an organisation and its officials.

In the case at bar the complainant enjoyed the status of official from October 1974 to the end of December 1992. From 1 January 1993 to 31 December 1994 he was employed on the basis of special agreements, which contained an arbitration clause providing for an "arbitral panel" composed of three members.

The Tribunal's jurisdiction is therefore limited to the effects of the relationship between the WHO and the complainant from October 1974 to the end of December 1992.

(b) The complainant criticises the WHO for having made him sign the special agreements.

There is no need to consider whether all or some of his grievances can be linked to the relationship between the WHO and the complainant when he was an official. His objections were not raised in the internal procedure; in any case his claims on that score would be irreceivable under Article VII(1) of the Tribunal's Statute, for failure to exhaust the internal remedies.

*On the dismissal of the complainant's claim to recognition of his illness as service-incurred*

3. The rules invoked by the WHO are as follows. Staff Rule 1230.8.3 provides that:

> "A staff member wishing to appeal against a final action must dispatch to the Board concerned, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal specifying the action against which appeal is made and the subsection or sections of Rule 1230.1 under which the appeal is filed. The Board shall open its proceedings at the earliest possible moment after receipt of the appellant's full statement of his case."

Annex E to Part II, section 7, of the WHO Manual establishes that:

> "28. ...
>
> (e) The Director-General's determination on a claim for compensation under these rules shall – provided that the procedure set out in paragraph 29 has been followed in the event of a conflict of opinion on the medical aspects – be regarded as a final action, referred to in Staff Rule 1230.8, subject to appeal to the Board of Appeal at headquarters.
>
> 29. (a) In the event of a conflict of opinion on the medical aspects of the relationship between an illness or injury and the performance of official duties on behalf of the World Health Organization, the Director-General may refer the case for advice to a medical board composed of three duly qualified medical practitioners, one of whom shall be chosen by the Director-General, one by the staff member, and the third by the two practitioners so chosen. The costs of such a board shall be borne by the Organization.
>
> (b) A medical board composed as provided in subparagraph (a) above shall also be consulted if the staff member concerned, or surviving dependants, so request. This request must be made in writing within three months of the date when the Director-General's decision was notified to the staff member. In this case, if the original decision is confirmed, the claimant shall bear the medical fees and expenses of the practitioner chosen and half the medical fees and expenses of the third practitioner. If, however, the Director-General alters the original decision in favour of the claimant, the whole of the medical fees and expenses shall be borne by the Organization ..."

As the WHO says, in a dispute concerning a claim to compensation for illness, the channels of appeal differ according to the nature of the staff member's challenge to a decision by the Director-General:

- the Board of Appeal is competent where the appellant's claim is based on the legal grounds envisaged under Staff Rule 1230.1;
- the case must be referred to the medical board envisaged in paragraph 29 above where the dispute is of a medical nature.

4. The WHO objects to the receivability of the complaint.

(a) Its first plea is that the notification of the intention to appeal to the Headquarters Board of Appeal was late, thereby making the internal appeal irreceivable.

That position is contrary to the one taken by the Board of Appeal, which found the appeal receivable, and to that of the Director-General, who endorsed the Board's recommendation by taking the impugned decision.

(b) The WHO also appears to be arguing that the complainant did not follow the correct procedures for internal appeals: he took the matter to the Headquarters Board of Appeal even though it was not competent to examine a challenge on medical grounds, which in practice lay within the competence of the medical board.

5. The argument that the internal appeal was late must fail.

In the first place, the WHO failed in its duty of good faith toward its staff member: before the Tribunal it pleads that his internal appeal was late; yet it accepted precisely the opposite during the internal procedure and examined his internal appeal after finding that it had been submitted in time. Moreover, the fact that it examined his appeal shows that the requirement to exhaust the internal remedies was met.

Secondly, the reasons put forward by the Board of Appeal are pertinent. The complainant's letter of 23 February 1998, written after he was informed of the Director-General's decision by a letter of 14 January 1998, meets the conditions for a notification of intention to appeal. In substance, the complainant was also challenging the medical conclusions on which the Director-General's decision was based.

6. The case law has it that an organisation must interpret the statements of a staff member in good faith and that, as part of its duty to spare the staff member unnecessary injury, it may also be called upon to provide procedural guidance and help to put right a mistake (see Judgment 1734, *in re* Kowasch, under 3(g)).

Viewed from that standpoint, an internal appeal lodged with the wrong authority in an organisation may serve to meet a deadline; that authority will simply forward it to the competent body (see Judgment 1832, *in re* Durand-Smet No. 2, under 6).

In this case, the Director of the Programme and the Secretary of the Headquarters Board of Appeal did give the complainant fairly detailed indications. But he plainly misunderstood them, as he filed his internal appeal with the Headquarters Board of Appeal instead of requesting the convening of a medical board. It was clear that the alleged injury did not correspond to any of the circumstances set out in Staff Rule 1230.1, but that it was of a medical nature, since the complainant was claiming that, contrary to the opinion of the Director-General, there was an established causal link between his work as a collector and his eye condition. On the basis of the case law recalled above, the Board of Appeal and the Director-General should have considered that the alleged injury came under the appeal procedure envisaged in paragraph 29 quoted above. As they did not forward the complainant's internal appeal to the competent body, they must be deemed not to have fulfilled their obligations.

7. The Director-General is invited to take a new decision. The notification of intention to appeal, which was filed in time, must be regarded as constituting in practice a medical challenge to the opinions expressed concerning the existence of a causal link between, on the one hand, the activity performed by the complainant from October 1974 to May 1978 for the Onchocerciasis Control Programme and, on the other, his eye condition.

## DECISION

For the above reasons,

1. The case is sent back to the Director-General of the WHO for a new decision in accordance with 7 above.
2. All the other claims are dismissed.

**In witness of this judgment, adopted on 9 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

*(Signed)*

**MICHEL GENTOT JEAN-FRANÇOIS EGLI HILDEGARD RONDÓN DE SANSÓ**

**CATHERINE COMTET**

# NINETIETH SESSION

***In re* Nathan** **Judgment No. 2018**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the complaint filed by Mr Liston Anthony Nathan against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 16 March 2000 and corrected on 18 April, the OPCW's reply of 23 May, the complainant's rejoinder of 1 July and the Organisation's surrejoinder of 9 August 2000;**

**Considering Article II, paragraph 5, of the Statute of the Tribunal;**

**Having examined the written submissions and disallowed the complainant's application for hearings;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, a citizen of the Netherlands who was born in 1974, joined the OPCW on 14 April 1998 on a three-year fixed-term appointment as a storage specialist in the Technical Support Branch of the Verification Division at the Organisation's Equipment Store in Rijswijk. He held grade G.3. The first six months of his appointment constituted a probationary period.**

**The Head of the Technical Support Branch, who was the complainant's second-level supervisor and rating officer, filled out his performance appraisal report and signed it on 25 September 1998. The complainant received it on 1 October, the date it was signed by a countersigning officer.**

In adverse comments therein the supervisor recommended not extending the complainant's contract, but stated that he "may well be suited to another position in the Organisation". By a memorandum dated 12 October 1998 given to the complainant two days later, the Head of the Human Resources Branch informed him that his appointment would not be confirmed. He gave him sixty days' notice and said that the complainant would be on special leave with full pay during that period. On 22 October the complainant wrote to the Director-General requesting a review of the appraisal and of the decision to end his contract. On 27 November the Acting Director-General replied on behalf of the Director-General confirming the earlier decision.

The complainant appealed to the Appeals Council on 21 December 1998, pleading breach of due process and putting forward five other grounds for appeal. He asked for reinstatement in a different unit in the Organisation. In its report of 18 March 1999 the Appeals Council noted that, at the time the decision was taken not to confirm the complainant's appointment, there was "no special procedure in place for terminating an appointment 'during' or 'at the end of' the probation period", and that, for this reason, the normal procedure for termination set out in Interim Staff Regulation 9.1 and the rules thereunder applied in his case. Accordingly, it considered the memorandum of 12 October to be null and void and recommended paying the complainant an appropriate final settlement. Alternatively, if a final settlement could not be reached, it was of the opinion that a special advisory board, referred to in Regulation 9.1(b), should be convened to consider and report on the case, particularly on the five grounds stated by the complainant which lay outside the Appeals Council's field of competence. It considered that he should be on special leave without pay until the board had issued a recommendation. It also recommended that the Director-General should urgently promulgate an administrative directive on probation rules and procedures.

The Special Advisory Board constituted to hear the complainant's case submitted its report of 7 September 1999 to the Director-General through the Joint Advisory Board. It recommended that the complainant should be paid "full salary and benefits, including Provident Fund contributions" from the time those payments had ceased, and that he should be offered suitable fixed-term employment, on a probationary basis, elsewhere in the

Organisation. The Director-General did not endorse the Special Advisory Board's view, and in a letter of 5 November 1999 upheld the decision to end his appointment. Following a request from the complainant, the acting Director-General wrote to him on 23 December 1999 giving him leave to appeal directly to the Tribunal instead of resubmitting his case to the Appeals Council. The complainant cites that letter as the impugned decision.

B. The complainant is challenging the termination of his appointment on six grounds. First, he pleads denial of due process. He submits that, in the absence of a special procedure for terminating an appointment at the end of a period of probation, the normal procedure for termination, set out in Staff Regulations 9.1 and 9.3 and the rules issued thereunder, must apply. The OPCW failed to observe that procedure. Regulation 9.1(a) states that the Director-General is authorised to end a staff member's appointment if "the services of the individual concerned prove unsatisfactory", but Regulation 9.1(b) states that no such termination can take place until a special advisory board has reported on the matter. No such board was convened prior to his receiving notice of termination.

Secondly, he claims that his performance appraisal, on which the decision to terminate his appointment was based, was tainted with prejudice. He was treated in an "abusive and discriminatory" way by some colleagues and his attempts to complain only led to a negative performance appraisal report. He explains that he is of Indian descent and had to bear the brunt of insensitive remarks. His abilities were belittled by his colleagues. Moreover, the day after he was given his performance report he was denied access to the building where he worked, only to be told a few hours later by the Human Resources Branch that he had to return to his workplace.

Thirdly, he argues that there were errors of fact. His supervisor's appraisal of his services was inaccurate. He produces copies of e-mails in which inspectors to whom he issued equipment testified that they were satisfied with his performance.

Fourthly, contrary to his expectations upon recruitment, the OPCW failed to train him on the equipment he had to use. He learned how to operate the machinery by reading the manuals.

Fifthly, contrary to principles upheld by the Tribunal, he received no warning from the OPCW about the consequences of his alleged shortcomings. It did not forewarn him that his job was in jeopardy. He was simply told to socialise more with his colleagues.

Lastly, he takes issue with the OPCW's failure to transfer him to another position, in line with his supervisor's comment in his appraisal report. The Administration denied him that opportunity and handled his case in an unfair manner. He points out that both the Appeals Council and the Special Advisory Board found in his favour.

He claims relief for loss of past and potential earnings, from the time when his appointment was terminated until the date it was due to expire. He also seeks the quashing of his performance appraisal report, reinstatement on a fixed-term contract in a unit other than the Technical Support Branch, compensation for moral injury, and costs.

C. In its reply the Organisation denies that the complainant was deprived of due process. It gave him "every opportunity at every stage in the process to present his case". The OPCW asserts that the Appeals Council, the Special Advisory Board and the Joint Advisory Board all heard his case. In determining which rules applied to his termination the complainant disregarded the fact that he was on probation and that a distinction has to be drawn between the non-confirmation of a probationary contract and the termination of a confirmed contract. He was granted an extra two months' notice in recognition of the fact that the formal notice of termination was sent to him close to the end of the probationary period.

Under Article VIII, paragraph 44 of the Chemical Weapons Convention the paramount consideration in employing staff is to secure "the highest standards of efficiency, competence and integrity". In taking the decision not to confirm the complainant's contract, the Director-General relied on evaluations and recommendations made by the complainant's supervisors, which were "a fair reflection" of the complainant's work. The Organisation submits that the Director-General's decision, which is a discretionary one, was not based on errors of fact: it was "well founded and in the Organisation's best interest".

The OPCW rejects other allegations made by the complainant. He must have been aware that his performance was not adequate; he was warned of his poor performance during the course of the probationary period. He admits to having had at least two meetings with his supervisors, even if he alleges that the only implied criticism was that he should socialise more. He was given the necessary training in his job, and he has failed to prove that the Director-General's decision was motivated by bias. The Organisation was under no obligation to transfer the complainant to a different department, particularly since he had shown no special aptitude for work in any other area.

D. In his rejoinder the complainant points out that Staff Rule 9.1.01(b) defines "termination". The version in force at the time of his dismissal made no reference to probation: it defined termination as "any separation from service initiated by the Director-General other than completion of a fixed-term contract or summary dismissal for serious misconduct". All cases of separation from service were then required to be examined by a special advisory board before a decision was taken. In his case, the Organisation failed to submit a proposal to terminate his contract to such a board before deciding to end his appointment.

He adds that no formal record was made of the warning he was purportedly given. His immediate supervisors were not his rating officers and had not been asked to give him a formal warning. He was given no periodic reports during the probationary period, nor did he have the opportunity to rebut his appraisal report. He should also have been informed beforehand of the precise reasons for his termination. As the Organisation tacitly concurs in its reply, he was not notified in good time of the decision to end his employment.

He requests the Tribunal to order the defendant to pay him "full salary and benefits, including Provident Fund contributions, for the entire period since such payments ceased". He asks for legal and administrative costs and presses his claim to reinstatement.

E. In its surrejoinder the Organisation points out that, in his letter of 22 October 1998 to the Director-General, the complainant referred to short meetings held in July and August 1998 with his supervisors. It says that his immediate supervisor raised the matter of his less than satisfactory performance with him during those two meetings. Moreover, the complainant had the opportunity to enter a rebuttal against his appraisal report on 1 October 1998, but did not do so at that time.

## CONSIDERATIONS

1. The complainant attacks a decision of the Director-General of the Organisation for the Prohibition of Chemical Weapons (OPCW) in respect of the non-confirmation of his appointment after a probationary period and the termination of his employment prior to the expiry of his fixed-term contract.

2. The complainant, a citizen of the Netherlands, joined the OPCW on 14 April 1998 on a fixed-term appointment for three years with a probation period of six months. He held grade G.3 and served as a storage specialist within the Technical Support Branch of the Verification Division until 13 December 1998.

3. On 23 July 1998 the Head of Staff Administration forwarded to the Head of the Technical Support Branch a performance appraisal report, requesting him to make a recommendation concerning the confirmation of the complainant's contract. On 1 October 1998 the Head of the Technical Support Branch gave the report to the complainant. He attributed to him an overall rating of "mediocre", and recommended that the complainant's contract should not be confirmed. On 14 October 1998 the complainant received a memorandum dated 12 October from the Head of the Human Resources Branch informing him of the non-confirmation of his appointment because of his unsatisfactory performance during the probationary period, giving him sixty days' notice. On 22 October 1998 the complainant requested a review of the appraisal and the decision not to confirm his appointment, pursuant to Interim Staff Regulation 11.1 and Provisional Interim Staff Rule 11.2.02(a). On 27 November 1998 the Acting Director-General informed the complainant that, after consideration of his

request, it had been decided to confirm the decision set out in the memorandum of 12 October 1998.

4. On 21 December 1998 the complainant filed an appeal to the Appeals Council against the decision to terminate his appointment. The Council determined that, when the decision not to confirm it was taken, the OPCW had "no special procedure in place for terminating an appointment 'during' or at the end of' the probation period". It also determined that, in the absence of a special procedure for terminating such an appointment, the normal procedure for termination as set out in Interim Staff Regulation 9.1 and the rules thereunder applied. The Council recommended to the Director-General that: (1) an appropriate final settlement should be offered to the complainant in compensation for procedural irregularities; (2) alternatively, if a final settlement could not be reached at that stage, the Director-General should appoint a special advisory board, as required under Regulation 9.1(b), to consider and report on the case, and place the complainant on special leave without pay until the Special Advisory Board had considered the question of his termination and made a recommendation – particularly on the five of six grounds of appeal put forward by the complainant which did not fall within the scope of the Appeals Council's jurisdiction; and (3) the Director-General should promulgate an administrative directive on probation.

5. A Special Advisory Board was convened to investigate the matter. It confirmed the Appeals Council's finding that the decision to terminate the appointment of the complainant was null and void because of the Organisation's failure to submit a proposal, in accordance with Regulation 9.1(b), to a special advisory board set up by the Director-General, before taking a decision not to confirm his contract. It further concluded that the complainant had not received a formal warning prior to the decision being taken. The Board determined that informal meetings between the complainant and his supervisors (but not between the complainant and his rating officer) had taken place during the six-month probationary period and certain minor criticisms were expressed at these meetings. As the Staff Regulations in force at the time in no way limited the application of the principles of due process in a manner which excluded

staff on fixed-term contracts with probationary periods, the Organisation's failure to issue a warning breached a fundamental principle of international civil service law. The Board also took cognisance of the disregard for the provisions of the relevant administrative directive on performance appraisal and the provisions of the relevant administrative directive on the procedure to be followed in cases of termination of appointment for unsatisfactory services. According to the Board, the former required an appraisal to "take place at the end of the first three months of work corresponding to the period of probation". The complainant's performance appraisal report had not been completed or signed by the Head of the Technical Support Branch until 25 September 1998, just three weeks before the probationary period was due to expire. The Board also found that "neither the rating nor the countersigning officer who recommended the non-confirmation of [the complainant's] contract had sufficient knowledge or understanding of [his] work to form an independent opinion on the subject". They had allowed themselves to rely on second and third-hand information in forming their opinions. The Board also found that the Organisation had failed to maintain a formal record of the complainant's perceived deficiencies. Due to the absence of records of any formal allegations against the complainant and the "polarisation" of allegations which followed in the wake of the decision not to confirm his contract, the Board determined that it was "not in a position to form a firm view on the substantive merits or otherwise of this decision". It stated that the mutual allegations which "had proliferated" since the decision made it impossible for a disinterested observer to decide whether the complainant was in fact as incompetent as he was alleged to have been, or whether the complainant's allegations were in fact founded.

6. On 5 November 1999, after receiving these recommendations, the Director-General informed the complainant that he saw no reason to reconsider the decision communicated by the Acting Director-General on 27 November 1998 and thus he was upholding the decision not to confirm the complainant's appointment. That is the decision now under challenge.

7. The following are the relevant statutory provisions of the Interim Staff Regulations and Provisional Interim Staff Rules which applied at the

material time. Regulation 9.1 of Article IX – Separation from service – provided:

> "(a) The Director-General may terminate the appointment of a staff member prior to the expiration date of his/her contract if the necessities for the service require abolition of the post or reduction of the staff; if the services of the individual concerned prove unsatisfactory; if the conduct of a staff member indicates that he/she does not meet the highest standards of integrity required by the Organisation; or ...
>
> (b) No termination under subparagraph (a) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Director-General."

Rule 9.1.01 – Consideration of termination of appointment, definition of termination and abolition of posts and reduction of staff – stated:

> "(a) *Joint Advisory Board*
>
> The Director-General shall not terminate the appointment of a staff member in accordance with the provisions of Regulation 9.1.(a) until the matter has been considered and reported on by the Joint Advisory Board established in accordance with Staff Rule 8.1.02.
>
> (b) *Definition of termination*
>
> A termination within the meaning of the Staff Regulations is any separation from service initiated by the Director-General other than completion of a fixed-term contract or summary dismissal for serious misconduct."

Rule 9.3.01 - Notice of termination – was as follows:

> "(a) A staff member whose fixed-term appointment is to be terminated shall be given not less than 60 days' written notice of such termination.
>
> (b) A staff member whose short-term appointment is to be terminated shall be given not less than five days' written notice of such termination or such notice as may otherwise be stipulated in his or her letter of appointment.
>
> (c) In lieu of these notice periods, the Director-General may authorise compensation calculated on the basis of the salary and allowances which the staff member would have received had the date of termination been at the end of the notice period."

8. The Tribunal finds that the complainant has successfully demonstrated that, in the case at bar, there were numerous procedural irregularities which call for its intervention. In agreement with the Appeals Council and the Special Advisory Board the Tribunal finds that the Staff Regulations, Rules and administrative directives in force at the time do not contain specific provisions for the non-confirmation of fixed-term appointments during or at the end of a probationary period. The provisions relating to the termination of fixed-term appointments without probationary

periods therefore apply. This finding is supported by a plain reading of Rule 9.1.01(b) which defines termination in the manner described above. The non-confirmation of the complainant's contract falls squarely within this definition.

9. Based on this finding, the OPCW had certain obligations towards the complainant under its statutory provisions:

(1) Pursuant to Regulation 9.1(b), the Director-General was obligated to refer the question of the complainant's termination to a special advisory board appointed by him, before the termination referred to in Regulation 9.1(a) could take place.

(2) Pursuant to Rule 9.1.01, the Director-General could not terminate an appointment in accordance with the provisions of Regulation 9.1(a) until the matter had been considered and reported on by the Joint Advisory Board established in accordance with Staff Rule 8.1.02.

10. In the case at bar, the Director-General did not refer the complainant's termination to a special advisory board or to the Joint Advisory Board prior to actually terminating his contract. The result constitutes a serious procedural flaw.

11. Although the Special Advisory Board and Joint Advisory Board were subsequently convened to report on this matter, this was done further to a recommendation of the Appeals Council after a review of the decision to terminate the complainant's appointment. They were not convened prior to the termination of his appointment, as required by Regulation 9.1 and the related rules, and thus, the Director-General failed to follow the procedures set forth for the termination of an appointment.

12. Furthermore, since the complainant's employment was terminated for unsatisfactory services he should have been given a warning to allow him a chance to improve his performance. No proper warning was given. Both parties referred to two meetings where minor concerns with respect to the complainant's working relationship with co-workers were discussed. Discussions between the complainant and his supervisors (neither of whom was his rating officer) with respect to relatively minor concerns do not

constitute a warning so as to make the complainant aware of the risk of dismissal and the need for improvement. Moreover, the performance appraisal report, which was completed by the Head of the Technical Support Branch on 25 September 1998 and which informed the complainant of his unsatisfactory performance and the non-confirmation of his contract, does not constitute proper warning. In providing this document three weeks prior to the termination of the contract, the defendant failed to follow its own administrative directives with respect to performance appraisals which require completion of a report "at the end of the first three months of work corresponding to the period of probation". The Organisation did not fulfill its obligation properly to warn the complainant. The performance appraisal was the first and only indication that the defendant was dissatisfied with the quality of the complainant's work.

13. In the circumstances, the Tribunal finds it unnecessary to take up the complainant's plea that the performance appraisal was based on erroneous facts or that it was tainted by bias, while noting, however, that the Organisation has failed to rebut or refute either of these allegations.

14. The Tribunal also notes that, as early as 9 October 1998, the Organisation's Legal Division advised the Administration of the procedure to be followed in terminating the complainant's appointment. Specifically, in a memorandum of that date, the Administration was advised of its obligation to set up a special advisory board to investigate the case and to report back to the Director-General. This advice, like the subsequent findings of the Appeals Council and the detailed and devastating findings of the Special Advisory Board, appear inexplicably to have been simply ignored by the Director-General.

15. In the circumstances, the impugned decision cannot stand and must be quashed. The complainant is entitled to be reinstated in his post or in one of an equivalent grade with full salary and benefits (including any salary increases which he would have received if he had not been terminated) to the end of his fixed-term appointment.

**16. The complainant is also entitled to costs in the amount of 2,000 euros.**

## DECISION

**For the above reasons,**

1. **The impugned decision is quashed, and the Organisation is ordered to reinstate the complainant with full salary and benefits (including any applicable increases) to the end of his fixed-term appointment.**
2. **The Organisation shall pay the complainant's costs in the amount of 2,000 euros.**
3. **All other claims are dismissed.**

**In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

**MICHEL GENTOT**

Mella Carroll

**MELLA CARROLL**

**JAMES K. HUGESSEN**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

**CATHERINE COMTET**

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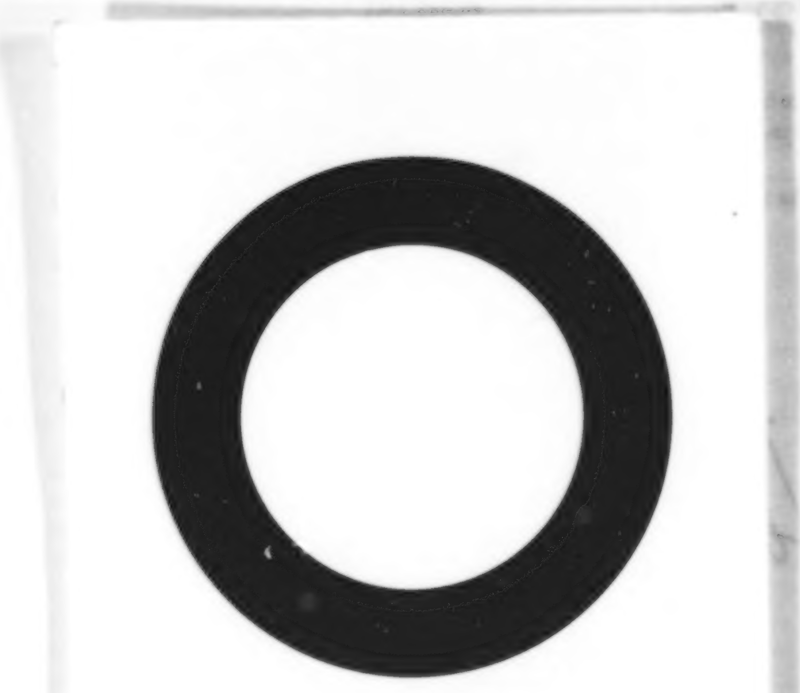

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

# NINETIETH SESSION

***In re* Verma** **Judgment No. 2019**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Tuhin Verma against the United Nations Industrial Development Organization (UNIDO) on 25 October 1999 and corrected on 23 November 1999, UNIDO's reply of 2 March 2000, the complainant's rejoinder of 8 May, and the Organization's surrejoinder of 10 August 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 1 September 1986 the complainant, who was born in 1945, was seconded from the Government of India to UNIDO on a two-year fixed-term appointment at grade P.5. His secondment was subsequently extended until 31 December 1989. On 19 December 1989, the Government of India accepted his voluntary retirement from government service, but his employment with UNIDO continued.

In March 1996 he was appointed as the Officer-in-Charge *ad interim* of the Asia and Pacific Bureau in the Country Programmes and Funds Mobilization Division. Another staff member was eventually appointed to the post, so on 1 October 1996, the complainant was reassigned as a Senior

Area Programme Officer at grade P.5 on a post "borrowed" from another bureau within the Division. His contract was to expire on 31 December 1996.

In a memorandum of 16 December 1996 the Director of Personnel Services informed the complainant that his supervisor had rated five out of six performance elements in part II of his performance evaluation report for the period from 1 January to 30 September 1996 as "needs improvement", therefore his within-grade salary increment was being suspended until the report had been completed. The sixth element was rated "fully meets expectations". The Director of Personnel Services also stated that his fixed-term contract would be extended for six months, until 30 June 1997, and that any extension beyond that date would be considered in the light of his performance. The complainant completed the staff member's portion of the report on 30 January 1997. His second reporting officer, the Director-General, gave him the overall rating "needs improvement". On 25 April 1997 the complainant lodged a rebuttal against his performance evaluation report. Since he and the Administration were unable to agree on the composition of the Panel, the rebuttal procedure was never completed.

On 28 February 1997 the Director of Personnel Services had informed the complainant that the Director-General was reassigning him to the Enterprise Development and Restructuring Branch of the Human Resource, Enterprise and Private Sector Development Division. Additionally, his contract would be extended until 31 August 1997 in order to allow for a six-month period to evaluate the complainant's performance in this new job. On 14 July, his supervisor sent the Director of Personnel Services a special performance evaluation report on the complainant. Although he found the complainant's performance to be satisfactory, the supervisor noted that, because the nature of the work in the Division was incompatible with the complainant's skills and experience, he had been unable to assign the complainant meaningful work. On 23 July the Director of Personnel Services informed the complainant that his appointment in the Division could not be extended further. However, other reassignment possibilities would be explored but, should none materialise, his contract would be allowed to expire.

On 22 August 1997 the Director of Personnel Services informed the complainant that his contract would terminate on 31 August because it had not been possible to identify a suitable post for him. On 28 August the complainant wrote to the Director-General requesting a review of that decision. The Director of Personnel Services replied on 29 August on the Director-General's behalf stating that, although the decision still held, his contract would be extended for one month on "humanitarian grounds".

On 23 October 1997 the complainant appealed to the Joint Appeals Board against the decision not to extend his contract and, on 8 July 1999, the Board issued a report to the Director-General in which it recommended dismissing the appeal. On 5 August 1999, the Secretary of the Joint Appeals Board sent the complainant the decision of the Director-General dated 4 August rejecting his appeal. That is the impugned decision.

B. The complainant makes three pleas. First, he submits that the decision not to extend his contract was tainted with prejudice and discriminatory treatment. He had a legitimate expectation of continued employment as he had served the Organization for more than ten years with excellent performance reports. When he retired from government service he expected his employment with UNIDO to continue until he reached retirement age. He was "illegally" removed from his post because his supervisor disliked him and the Director-General believed that the complainant had something to do with his unsuccessful bid for re-election.

Secondly, he argues that the decision was procedurally flawed. The manner in which he was passed over for promotion for the post of Director of the Asia and Pacific Bureau violated the placement and promotion system which the Director-General announced in circular DG/B(M).68 and which came into effect from 1 January 1996. As the incumbent of that post, even if temporarily, he should either have been promoted or reassigned to another post at his existing grade. Instead, he was placed on a "borrowed" post and this deprived him of any career prospects. Additionally, he should have been given truthful and proper reasons for the decision not to extend his contract. He claims that a negative performance evaluation report had been written by his new supervisor "in stark contrast" to his previous reports. He was led to believe that an extension of his contract was contingent upon improving his performance. However, when he fulfilled this condition the reason shifted to the unavailability of a suitable post. Not only were his previous evaluation reports very positive but also the Director-General had himself signed some of them and in September 1996 publicly commended the complainant for his outstanding work.

Withholding his salary increment also constituted a procedural flaw. No special evaluation report was prepared, as required by the Staff Rules. Additionally, the increment should have been based upon the most recent report in his personnel file: that one justified awarding the increment.

Thirdly, he contends that he was denied due process and a fair hearing during the appeals proceedings. He claims that one of the members of the Joint Appeals Board was substituted for an ally of the Director-General.

He requests the Tribunal to order UNIDO: (1) to reinstate him with effect from 1 October 1997 and restore all due benefits and entitlements, including pension fund contributions and insurance coverage or if reinstatement is not possible, to pay him the equivalent of his full salary, including benefits and entitlements, from 1 October 1997 until he reaches sixty years of age; (2) to pay him his within-grade salary increment from 1 November 1996; (3) to award him three years' pay as compensation for the injuries caused by the "procedural irregularities, discrimination and ill treatment, and abuses of authority"; (4) to remove all adverse material, including the contested performance evaluations, from his personnel file; and (5) to pay him interest on all payments due, and costs.

C. In its reply UNIDO states that the complainant was separated from service when his fixed-term contract came to an end; this was done in observance of the rules. Furthermore, according to Rule 103.10(a) then in force a "fixed-term appointment does not carry any expectancy of renewal". Therefore, the decision not to extend the complainant's contract did not constitute an abuse of the Director-General's authority nor was it tainted with prejudice: a post suitable for him could not be found. Furthermore, on 23 July 1997, he was given the reasons why his contract could not be extended; these had no connection with his poor performance evaluation report in 1996; his allegations of prejudice and discriminatory treatment are therefore unfounded.

The Organization submits that it was not a procedural error to deny the complainant a salary increase. The rating "needs improvement" in his performance evaluation report for 1996 had been anticipated even if the report had not yet been completed. His supervisor was therefore justified in not recommending him for a salary increase.

It contends that his claim for an award of three years' pay as compensation for injury is irreceivable as it goes beyond the scope of the claims presented in his appeal. The Organization rejects all other claims made by the complainant.

D. In his rejoinder the complainant contends that the only condition for the further extension of his contract was satisfactory performance, and fulfilment of that condition created a legally binding obligation. Furthermore, the change in his status from that of a staff member seconded from the Government of India to that of UNIDO staff member created "a clear expectation of a full career within the organization". He argues that the Tribunal's case law emphasises the good faith required by all the parties when entering into agreements.

He contends that the Organization did not make sufficient efforts to redeploy him as required by the Tribunal's interpretation of Staff Rule 110.02(a).

E. In its surrejoinder UNIDO presses its plea that the complainant has put forward only unsubstantiated allegations of prejudice against him. It was due to the restructuring of the Organization that the complainant, along with other staff members, had to be reassigned in 1996; he was not a target of "unlawful reassignment". All of the complainant's reassignments have been justified. Staff Regulation 4.1 gives the Director-General authority to assign staff "to any of the activities or offices of the Organization". It attempted to find a suitable post for the complainant but was not successful.

The Organization reiterates that staff members on fixed-term appointments cannot expect continued employment until retirement. When the complainant's contract came to an end and no suitable post could be found for him, his service with UNIDO ceased. In addition, the complainant's performance was "uneven".

## CONSIDERATIONS

1. The complainant was seconded to UNIDO from the Government of India on 1 September 1986. He received successive appointments to different positions and on 19 December 1989 he voluntarily retired from service with the Government.

2. On 16 December 1996 the Director of Personnel Services transmitted to the complainant his performance evaluation report for the period from 1 January to 30 September 1996, part II of which had been completed by his supervisor after a meeting with him. Part III was to be completed by the complainant. The report would subsequently be submitted to the Director-General for completion of parts IV and V.

Unlike previous evaluation reports, in which the complainant was given high ratings, the 1996 report showed that five out of six performance elements had been marked "needs improvement"; the remaining element was rated "fully meets expectations" (the overall rating eventually given by the Director-General, as the second reporting officer, in part IV was "needs improvement").

Consequently, the complainant was informed that his within-grade salary increment, which was due in November, had been suspended until his performance evaluation report was completed. He was also informed that the Director-General had decided that his fixed-term appointment, which was due to expire on 31 December 1996, would be renewed for another six months, until 30 June 1997. A suitable assignment and terms of reference would be determined to measure his performance during this period. Any further extension of the contract would be considered in the light of his performance during those six months.

On 28 February 1997 the Director of Personnel Services informed the complainant that he was being reassigned to another Division and that his appointment had been extended to 31 August 1997. Any further extension would be contingent upon the complainant's meeting the terms of reference established by his new Division for the period from 1 March to 31 August 1997.

3. In the meantime, on 25 April 1997, the complainant lodged a rebuttal of his evaluation report for the period of 1 January to 30 September 1996.

4. On 14 July 1997 the complainant's new supervisor issued a special performance evaluation stating that, while the complainant had completed all the assignments given to him during the four-month period, he had "found it impossible to fully utilize the very specific profile and skills of [the complainant] in such a way as to provide him with meaningful full-time employment commensurate with his qualifications and grade. Indeed, for one month now, [he] has been without any assignment".

5. In view of such an assessment, on 23 July 1997 the Director of Personnel Services informed the complainant that his appointment in the Division could not be extended further; the possibilities for reassigning him would be explored, and if no assignment could be identified, his contract would expire on 31 August 1997. On 22 August the Director informed him that his appointment would not be renewed.

6. On 28 August the complainant requested the Director-General to review this decision. The next day, the Director of Personnel Services, on behalf of the Director-General, confirmed the reasons for the non-extension of the appointment. However, he informed the complainant that the Director-General had decided to extend his appointment by one month based on "humanitarian grounds".

7. Meanwhile, the rebuttal lodged by the complainant against his evaluation report was not pursued due to his inability, and that of the Administration, to resolve a deadlock with respect to the composition of the investigation panel. The disputed report was regarded as final when the deadlock could not be resolved by mid-December 1997.

8. On 6 August 1997 the Director of Personnel Services requested the Managing Directors of three divisions to inform him if any suitable posts were currently available for the complainant. However, the result of this

inquiry proved to be negative either because no post was available or because the complainant's qualifications were not appropriate.

9. On 23 October 1997 the complainant filed an appeal with the Joint Appeals Board under Staff Rule 112.02(b) against the decision not to extend his contract further. The Board met ten times from 11 February 1999 to 6 July 1999. Aside from the complainant, four other persons were heard. On 8 July the Board released its report recommending that the complainant's appeal be rejected in its entirety. The Director-General endorsed this recommendation on 4 August.

10. On 25 October 1999 the complainant filed this complaint in which he substantially reiterated the claims he had put before the Board, namely:

(1) that he be reinstated in service with effect from 1 October 1997, and that all benefits and entitlements due, including pension fund contributions and insurance coverage be fully restored;

alternatively, that in lieu of reinstatement, he be paid his full salary, including all benefits and related entitlements, from 1 October 1997 until he reaches sixty years of age;

(2) that the Organization pay him the within-grade salary increment, which was withheld, from 1 November 1996 onwards;

(3) that he be awarded compensation in an amount equivalent to three years' pay for the "procedural irregularities, discrimination and ill treatment, and abuses of authority which have caused him irreparable injury";

(4) that UNIDO expunge all adverse documents from his personnel records, including the contested performance evaluations;

(5) that the Organization reimburse him for the costs of this complaint and that he be awarded interest on all payments due to him.

11. The complainant's principal claim that he be reinstated in service as from 1 October 1997 is based on his assertion that the decision not to extend his fixed-term contract which was due to expire on 31 August 1997 but was extended to 30 September, was "tainted by prejudice and other

extraneous factors, that it was procedurally flawed and that the review of his appeal denied him the benefits of due process and a fair hearing".

12. Having served for eleven years with UNIDO, the complainant considers that he had a legitimate expectation of continued employment. The initial rationale for not extending his contract for another two years was the negative performance evaluation report by his new supervisor indicating that he "needs improvement" which contrasted with "the glowing evaluation" from the preceding years. Subsequently, the reason for the decision shifted to the lack of an available post.

13. The complainant also alleges that there were irregularities in the handling of his reassignments, which had less to do with the Organization's restructuring and his own qualifications and more with the Director-General's antipathy towards him in connection with his failed bid for re-election. There were no serious or good faith efforts to place him in another post.

14. Adverting to the complainant's plea for reinstatement, the Organization emphasises that he was separated from UNIDO as a result of the expiry of his last fixed-term appointment. He had accepted it subject to the conditions specified in the letter of appointment and those laid down in the Staff Regulations and Rules. Staff Rule 103.10(a) provides: "the fixed-term appointment does not carry any expectancy of renewal". Staff Rule 110.05(a) states: "A fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment".

15. UNIDO claims that, if it did not extend the complainant's appointment, it was not due to poor performance but rather the failure "to identify a *suitable post* for him after it had been ascertained that his skills could not be utilized effectively by [his Division]". Neither did it inform the complainant that his appointment would not be extended because of poor performance.

Non-availability of a suitable post was the explanation proffered by a member of Personnel Services in a memorandum of 16 February 2000 to the

Chief of the Office of Legal Affairs. Hence, there was no shift in UNIDO's argument.

16. The complainant learned from the Director of Personnel Services as early as 23 July 1997 – almost two months before the expiry of his contract – the reasons why his appointment might not be renewed. On 22 August he was informed that his contract would expire on 31 August. He requested the Director-General to review this decision; the result was that he was granted a one-month extension on "humanitarian grounds".

17. As regards the complainant's plea that no search in good faith was undertaken to find a suitable alternative post for him, UNIDO asserted that there was ample evidence to show that the Director of Personnel Services addressed inquiries to the Managing Directors of several divisions in July and August 1997 asking them to identify posts where the complainant's qualifications and experience could be utilised. The various replies were as follows: "He does not have the requisite skills to formulate and develop new programs"; "The professional qualifications and experience of Mr Verma will not be required ... [either] in the present configuration [or] in the future one"; "in view of the present budget exercise ... the possibility of Mr Verma's transfer ... was not envisaged".

The Organization points out that it exerted efforts to locate a suitable post for the complainant despite the fact that it had no obligation under its Staff Regulations and Rules, or his letter of appointment, to seek alternative employment for him.

18. The Organization rejects the complainant's allegation that "the review of his appeal denied him the benefits of due process and a fair hearing". The Joint Appeals Board carried out a thorough review of the case during ten meetings and interviewed four other staff members. In his decision of 4 August 1999, the Director-General endorsed the recommendation of the Board to reject the complainant's appeal.

19. With respect to the withholding of the complainant's salary increment, UNIDO claims that this was lawful since the case specifically falls under paragraph (g) of Appendix M to the Staff Rules which stated that

a salary increment will be withheld if the overall rating in the evaluation report indicates that the performance "needs improvement". The disputed report covering the period from 1 January to 30 September 1996 showed that five out of six performance elements needed improvement.

20. In its reply to the complainant's claim to compensation for moral injury on a number of counts, the defendant asserts that there is no precise evidence to justify such an award. It adds that, since neither the original appeal of the complainant nor his additional comments contain any such claim, this now constitutes an enlargement of the claims submitted in his appeal which should be rejected.

21. Lastly, UNIDO says that the complainant's demand that it expunge all adverse documents from his personnel records, including his contested performance evaluation reports, should not be granted as such information consists of correspondence which is objective, impartial and non-defamatory. As such, there is no legal basis for removing such documents from the Administration's files.

*Non-renewal of fixed-term contract*

22. Anyone who enters into a contract of employment for a fixed term must abide by its terms and is not entitled to automatic renewal or conversion to another type of appointment. The complainant accepted his appointment subject to whatever conditions were laid down in the letter of appointment and the provisions of the Staff Regulations and Rules.

23. A decision by an organization not to renew such a contract is within its power and authority. In a long line of cases the Tribunal has held that such a decision, being discretionary, "may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority". (Judgment 1262, *in re* Scherer Saavedra, under 4) Not one of these conditions is present in this case. (See also Judgments 600, *in re* Freeman, under 1; 972, *in re* Unninayar, under 6;

1249, *in re* Reznikov, under 8; 1405 *in re* Moore, under 4; and 1617, *in re* Lebtahi, under 1.)

24. The allegations of discriminatory treatment made by the complainant remain mere allegations since they have not been proved. Therefore, the Tribunal rejects them.

25. An official's lengthy record of service does not suffice to justify a legitimate expectation of continued employment. Not being a contractual right, it remains in the realm of speculation and has no basis in law; more a product of fancy than of fact.

26. Nor may an official insist on the renewal of a fixed-term appointment on the basis of what he or she perceives as past exemplary performance. The evaluation by the complainant's supervisors in the report for the period from 1 January to 30 September 1996 is indubitably an objective and accurate gauge of performance. Unlike his high ratings in the past, the disputed report disclosed that five out of six performance elements had been rated "needs improvement". Quite expectedly, the overall assessment of the second reporting officer – the Director-General – was likewise "needs improvement".

27. The Organization stressed that the non-renewal of the complainant's employment was based, not on performance, which was not exemplary, but on the lack of an available position suitable to the complainant's qualifications and experience.

28. The complainant has employed interchangeably the terms "termination", "forced separation" and "involuntary separation" in referring to his situation. These terms should not be confused with the term "expiration of the fixed-term contract" which is the technically correct and accurate term applicable to this case.

29. In the light of the foregoing, reinstatement is not a relief to which the complainant can claim to be entitled inasmuch as his employment with UNIDO ceased for a lawful cause. It follows that his claim to "benefits and

entitlements due, including pension fund contributions and insurance coverage" cannot be granted.

30. The complainant's employment with UNIDO having ceased lawfully, and since it has been shown that he is not entitled to reinstatement, the complainant's alternative claim to payment of the "equivalent of his full salary, including all benefits and related entitlements for the period 1 October 1997 until he reaches the mandatory age of retirement", cannot be allowed.

### *Within-grade salary increment*

31. The claim to a within-grade salary increment has no legal basis since at the material time paragraph (g) of Appendix M to the Staff Rules stated: "The within grade salary increment ... shall be withheld if the overall rating given in part IV of the staff performance evaluation report is that the performance needs improvement ... "

### *Additional compensation for irreparable injury*

32. The claim to additional compensation in the amount of three years' pay for "procedural irregularities, discrimination and ill treatment, and abuses of authority which have caused him irreparable injury", is apparently not linked solely to the non-renewal of his appointment. It also relates to the manner in which he was assigned and re-assigned to different sections within the Organization, as well as to alleged bias and prejudice on the part of his supervisors. The complainant concludes in his rejoinder that "the illegal behaviour of the defendant calls for the award of exceptional compensation".

33. The complainant discerns sinister motives in the actions of his supervisors that were detrimental to his interests. In particular, he accused his immediate supervisor, who had just become the Officer-in-Charge of his Division of "hostility, bias and harsh treatment" arising in part from the fact

that the complainant was "a convenient scapegoat" for the disagreements that Officer had had with the complainant's previous supervisor.

34. The Director-General himself has not been spared from the complainant's diatribes. From a personal record the complainant has kept reporting on two conversations he had with the Director-General, he contends that the Director-General stated that he could expect little support for renewal of his contract or any kind of generosity given his involvement in schemes to undermine his re-election, as well as all kinds of intrigues against him.

35. Such unsubstantiated and sweeping accusations imputing ill-will, malice and bias against his supervisors can hardly be made the basis for an award of damages.

36. Since the complainant's principal claims fail, so too do the claims to other forms of relief, namely, to expunge all adverse documents from the complainant's personnel records and reimbursement for costs.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

MICHEL GENTOT

James K Hugessen

JAMES K. HUGESSEN

Flerida Ruth P. Romero

FLERIDA ROMERO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL * GENEVA *

**Organisation internationale du Travail**
***Tribunal administratif***

**International Labour Organization**
***Administrative Tribunal***

***Registry's translation,***
***the French text alone***
***being authoritative.***

# NINETIETH SESSION

***In re* Brillet** **Judgment No. 2020**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the complaint filed by Mr Hervé Brillet on 7 January 2000 against the Customs Co-operation Council (CCC), which in 1994 became the World Customs Organization (WCO), the CCC's reply of 21 February accompanied by the observations submitted by Mr H. at the Tribunal's request, the complainant's rejoinder of 30 May and the Council's surrejoinder of 1 September 2000;**

**Considering Article II, paragraph 5, of the Statute of the Tribunal;**

**Having examined the written submissions;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, a French national who was born in 1947, joined the CCC in 1975 as a translator. He is currently employed at grade LT3 in the Translation Service.**

**On 28 October 1998 the Organization published Staff Notice No. 33/98 announcing the vacancy of the post of Head of Translation Service at grade LT5. The post was to be filled as of 1 January 1999 by transfer or promotion. The complainant applied for the post in a letter of 5 November 1998. Three other members of the Translation Service, including Mr H., also applied. In its report of 17 November, the Selection Board unanimously recommended appointing Mr H. On 19 November the**

Secretary General endorsed this recommendation and informed the complainant in writing that his application had not been successful.

By a letter of 14 December, the complainant requested the Secretary General to modify or withdraw his decision of 19 November 1998. The new Secretary General wrote to him on 19 January 1999 to inform him that he would not comply with his request. On 8 February the complainant wrote back asking him to convene the Appeals Board. In its report of 1 October, the Board informed the Secretary General that it considered that the selection procedure had not been flawed by any procedural or substantive error such as to taint the decision to appoint Mr H. to the post of Head of Translation Service. In a letter of 18 October 1999, which is the impugned decision, the Secretary General informed the complainant that he endorsed the opinion of the Appeals Board.

B. The complainant submits that the Staff Manual has rules on competitions and rules on promotion. In this case both applied and should be read together. But the Selection Board and the Secretary General applied only the rules on promotion, so there was a mistake of law and failure to take into account the terms of the notice of competition. He explains that, in the context of a promotion procedure, the Secretary General may freely appoint an official on the basis of a comparative examination of the merits of the candidates in their previous assignment and after consulting an advisory body. However, in the context of a competition procedure, he must appoint the best qualified candidate after an objective examination has been undertaken of the capacity of the candidates to discharge the duties inherent in the post. This examination must consist of comparing the qualifications of the candidates with those set out in the notice of competition and, where appropriate, assessing the results of tests. He alleges that in the present case the Selection Board did not evaluate the candidates' qualifications objectively or, at the very least, gave undue preference to comparing their merits over their qualifications. Furthermore, he says that the Secretary General wrongly considered that he had the discretionary authority to select a candidate on the sole basis of his competence and integrity without being bound by other criteria or the recommendations of the Selection Board. Quoting Mr M., the member of the Selection Board nominated by the Staff Committee, the complainant alleges that the Staff Regulations were not "taken into consideration". He requests that Mr D., the member of the Selection Board appointed by the Secretary General, be invited by the Tribunal to make a statement on this point.

The complainant also contends that there was breach of Staff Regulation 28(f)(i) because the Selection Board did not establish criteria for the assessment of the candidates' qualifications before proceeding to examine them. In this respect, he cites the case law of the Court of First Instance of the European Communities and criticises the fact that technical criteria prevailed over the applicants' managerial capacities, which were reflected mainly in their grades and seniority. He also says that Staff Rule 11.3(d) was violated because the Selection Board did not take into consideration the candidates' annual reports. He considers that he was particularly injured by this flaw as his own last two performance reports proposed his promotion to grade L4. Lastly, he submits that obviously wrong conclusions were drawn from the evidence since Mr H.'s qualifications were not comparable to his own.

The complainant asks the Tribunal to set aside the decision of 18 October 1999 as well as the decisions he challenged in his appeal of 8 February 1999 – i.e. the rejection of his application and, implicitly, the appointment of Mr H. – and to order the Council to pay him 150,000 Belgian francs in costs.

C. In its reply the Council explains that, since Mr M. was invited to comment in the present case, it seemed proper for it to include in its report the observations made by Mrs T., who chaired the Selection Board, and by Mr D.

The Council adds that the Tribunal may exercise only limited review over the decision to appoint Mr H. Under Staff Regulation 11(a) and the case law, the Secretary General has broad discretionary authority to fill a vacant post and is not bound by the recommendations of the Selection Board.

It considers that the complainant has misread the applicable regulations and rules and points out that the rules on appointment and on promotion are the same. Quoting Mrs T., the Council also contends that there was no breach of the Staff Regulations as the members of the Selection Board are expected to be familiar with the Staff Manual. The Council also has difficulty in understanding the distinction drawn by the complainant between "merits" and "qualifications". The qualifications which are to be examined by the Selection Board, in accordance with Staff Regulation 28, cannot be understood in the very narrow meaning which the complainant appears to give them. In a competition – in this case a competition "on the basis of qualifications" – the Selection Board is invited to take all relevant factors into consideration. The Council affirms that the Selection Board, as well as the Secretary General, made a full and impartial assessment of the merits and qualifications of the candidates for the post of Head of Translation Service and that no mistake of law was made.

The Council submits that, even though they were to the advantage of Mr H., the criteria on which the Selection Board made its recommendations were established lawfully and in the interests of the Organization. It recognises that those criteria were probably not determined before interviewing the candidates, but Staff Regulation 28 does not require them to be pre-established. It considers that the case law cited by the complainant is "of little relevance".

The Council adds that no provision of the Staff Rules requires it to provide the members of the Selection Board with the annual reports of candidates for promotion or appointment. The members of the Selection Board could have asked to see these reports, but did not do so since the reporting officer of the four candidates, Mr D., was a member of the Board.

Citing the case law, the Council contends that the complainant has not proved that his "undeniable" qualities were manifestly superior to those of Mr H. Lastly, it expresses its conviction that the appointment of the latter best serves the interests of the Organization.

In his observations Mr H. briefly summarises his career and responsibilities in the Organization and emphasises that in 1997 his performance report described him as the "linchpin of the English Section". He states that, since his appointment, he has performed his duties as Head of Translation Service to the satisfaction of his colleagues and the management.

D. In his rejoinder the complainant submits first that the observations of Mr H. raise no new aspects of the case.

He also contends that the distinction he draws between qualifications and merits is perfectly justified since the two concepts cover distinct issues. Nevertheless, he considers that the merits of the candidates can also constitute "a qualification for the performance of the duties". He also recognises that the Staff Manual does not oblige selection boards to take into account the annual reports of candidates for a promotion. However, he considers that such an obligation must exist, otherwise the rules on annual reports would be voided of most of their meaning.

Lastly, the complainant alleges that Mr H.'s qualifications are better than his only in areas not covered by the requirements for the post of Head of Translation Service. The notice of competition was therefore not respected.

E. In its surrejoinder the Council maintains that the procedure to be followed with a view to filling a vacancy is "unique and unequivocal". It is set out in Staff Regulation 28 and was observed on all points. The Council considers that the complainant tends to exaggerate his own merits and to "undervalue" those of Mr H. and that no blatantly wrong conclusions were drawn from the evidence.

## CONSIDERATIONS

1. On 28 October 1998 the WCO announced a competition for the post of Head of the Translation Service at grade LT5. Candidates were to be assessed "on the basis of qualifications and, where appropriate, tests".

Four of the eight members of the service applied: Mr G. and Mr N., revisers at grade LT4, and Mr H. and the complainant, translators at grade LT3.

A Selection Board was convened to examine the applications. It was composed of a chairperson, Mrs T., Head of Administration, and two members: Mr D., who was appointed by the Secretary General and was Head of the Translation Service at the time, and Mr M., appointed by the Staff Committee. After interviewing the candidates, the Selection Board put the complainant and Mr H. on a short list, deeming them to be the best qualified for the post. In its report to the Secretary General, the Board unanimously recommended appointing Mr H. The Secretary General endorsed that recommendation and informed the other candidates that their applications had been unsuccessful.

The complainant filed an internal appeal challenging his rejection and the appointment of Mr H. The Secretary General dismissed it by a decision of 18 October 1999.

The complainant is now challenging that decision as well as the rejection of his application and by implication the appointment of Mr H. to the post of Head of the Translation Service.

2. The complainant applied to the Tribunal for the hearing of Mr D. as a witness. After the complaint was filed Mr D. sent in a written submission. Since subsequently the complainant has not expressly confirmed that request and since such a hearing is not necessary to the Tribunal's ruling, his application is disallowed.

3. The complainant alleges procedural flaws and blatant misappraisal of evidence by the appointing authority.

(a) Whether or not to appoint someone is a discretionary decision taken by the appointing authority. A steady line of precedent has it that such a decision is subject to only limited review and that the Tribunal will set it aside only if it was taken *ultra vires*, shows some formal or procedural flaw, if there was a mistake of fact or of law, if essential facts were overlooked, if there was misuse of authority or if an obviously wrong inference was drawn from the evidence (see, for example, Judgment 1689 *in re* Montenez No. 2, and the others cited therein).

(b) Candidates for a post to be filled by competition are entitled to have their applications considered in good faith and in keeping with the basic rules of fair and open competition. That is a right that all applicants must enjoy, whatever their hopes of success may be. The rules on selection and appointment must be scrupulously followed and when the process proves flawed, the Tribunal will quash the appointment it gave rise to, on the understanding that the organisation must shield the successful candidate from any injury that may result from the quashing of an appointment accepted in good faith (see Judgment 1990, *in re* Giordano, under 6, and the others cited therein).

4. The complainant's first plea is that the Council made "a mistake of law and failed to take account of the notice of competition, in that both the Promotion Board and the Secretary General saw fit to apply only the rules for promotion and not the rules for competitions, and thus compared the candidates' merits in their past performance and not their qualifications in the light of the requirements of the vacant post". At all events, he says, in comparing the candidates they "gave undue precedence to their merits over their qualifications".

The Council demurs.

The complainant's arguments stem from the meaning he gives to the words "qualifications" and "merit", and are based on the unproven and unlikely assumption that, when he endorsed the Selection Board's recommendation, choosing the most suitable candidate for the vacant post was not the Secretary General's uppermost concern.

There is no evidence to suggest that either the Board or the Secretary General so neglected the interests of the Council. The plea therefore fails.

5. Regulation 28, entitled "Selection Board", says:

> "(i) ... the Selection Board shall draw up a list of candidates who meet the requirements set out in the notice of competition.
>
> (ii) ...
>
> Where the competition is on the basis of qualifications, the Selection Board shall, after determining how candidates' qualifications are to be assessed, consider the qualifications of the candidates appearing on the list provided for in [(i) above] ..."

The complainant's second plea is breach of the above regulation: the Selection Board failed to set criteria for assessing the applicants' qualifications before considering them.

Although the evidence shows that the Board did not formally establish criteria before considering the candidates' qualifications, its three members were obviously at pains to select the candidate best qualified for the post. Besides, before making their choice they considered how much weight should be given to seniority and concluded that age would not be decisive if the youngest candidate proved to be the best.

So the Board did set criteria before adopting its recommendation, at least by implication if not formally. The complainant does not dispute that fact.

He does, however, appear to allege that the Board adopted the wrong criteria in that it gave preference to "merit", i.e. how the candidates had discharged their duties hitherto, rather than "qualifications", or how suited they were to the duties of the vacant post.

There is no evidence that the complainant's assertion is anything but mere speculation. The plea therefore fails.

6. The complainant's third plea is that the Council failed to make the candidates' annual reports available to the Selection Board. In support he cites Rule 11.3(d) of the Staff Rules which is about the drawing up and use of annual reports.

In rebuttal the Council observes that neither the Staff Rules nor any other written provisions require reports to be produced automatically when staff members apply for competitions. Although they may be of use to a Selection Board in some instances, in this case the Board did not ask for reports but was given information by one of its members, Mr D. (the supervisor of the complainant and Mr H.) who, as their reporting officer, was able to comment on their performance.

The Council has therefore broken no written procedural rule, and no implied rule exists on the subject. In the event, the Board was not deprived of any elements essential to a fair assessment of the candidates since Mr D. provided information and the Board members could have asked to see the reports had they seen fit.

For the same reasons, the precedents cited by the complainant to show that when international officials apply for a competition their annual reports should be made available on file, are not relevant here.

The plea fails.

7. The complainant's last plea is that the Selection Board and the Secretary General clearly misread the evidence because they failed to attach the necessary importance to the positive elements of his application. He stresses his organisational and personnel management skills and his experience, and sets out his ideas and objectives for the Translation Service. He refrains, however, from criticising the successful candidate.

In rebuttal the Council explains why it chose Mr H. rather than the complainant, though it recognises the latter's worth as a staff member and a candidate. It points out in particular that the Translation Service is fairly small and that the duties of whoever is appointed Head will involve more than just personnel management. The time and effort Mr H. has invested in his work, and his exceptionally high standard and output, augur well for the future. He has a better grasp of information technology tools and a wider knowledge of languages. (In addition to English, French and Spanish he speaks German, Dutch and Greek.) These facts are not disputed.

The burden of proof is on the complainant (see Judgment 1827, *in re* Ochani, under 6) to show that he was better qualified than Mr H. and that by rejecting his application the Organization drew obviously wrong conclusions from the evidence. He has not done so. The plea therefore fails.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT JEAN-FRANÇOIS EGLI HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

# NINETIETH SESSION

***In re* Reis-Ekelund (No. 2)** **Judgment No. 2021**
**(Application for review)**

**THE ADMINISTRATIVE TRIBUNAL,**

**Considering the application for review of Judgment 1907 filed by Mr Patrick Reis-Ekelund on 10 April 2000, the reply of 5 May from the International Office of Epizootics (OIE), the complainant's rejoinder of 19 September and the OIE's surrejoinder of 5 October 2000;**

**Considering Article II, paragraph 5, of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which neither party has applied for;**

## CONSIDERATIONS

**1. The complainant seeks review of Judgment 1907 delivered on 3 February 2000. In that judgment the Tribunal dismissed his complaint against the OIE in which he sought the quashing of the Director General's decision of 26 February 1999 to dismiss him on the grounds that his services were no longer satisfactory. Prior to his dismissal he had erroneously reported accounting anomalies in one of the OIE's regional offices.**

2. The complainant claims that the Tribunal, as constituted to rule on his case, was not impartial; that it did not take into account or mention the contents of the replies and notes that he sent his employer in response to the latter's criticisms; that it did not consider the fact that the accounts of the OIE's regional office for the Americas had been examined and approved by the auditors after the complainant's dismissal and not before; that it failed to rule on his claim that the OIE had made false accusations against him in regard to an "OIE-Thailand agreement"; and that it did not sufficiently describe the reasons for its decision.

3. As a rule, the Tribunal only seldom reviews its own judgments. Judgments are final and no appeal mechanism exists for the unsuccessful complainant. Furthermore, a review procedure is not expressly provided for in the Statute and Rules of the Tribunal. The general principles pertaining to the review of decisions have been laid out in Judgment 442 (*in re* Villegas No. 4) delivered on 14 May 1981, in the following terms:

> "2. *Inadmissible grounds for review*
>
> The Tribunal's judgments carry the authority of *res judicata* from the date on which it delivers them. Though subject to review thereafter, they will be reviewed only in exceptional cases. That is the rule under all judicial systems which allow review. It must therefore be made clear at the outset that several pleas in favour of review will not be allowed.
>
> One is an alleged mistake of law. To allow an application for review on the grounds of the Tribunal's legal reasoning would be to permit anyone who was dissatisfied with a decision to question it indefinitely in disregard of the principle of *res judicata*.
>
> Likewise the Tribunal will not allow review on the grounds of an alleged mistake in appraisal of the facts, i.e. the interpretation which the Tribunal has put on the facts.
>
> Failure to admit evidence is no valid reason for review; otherwise an unsuccessful party might challenge indefinitely the facts on which the judgment is founded.
>
> Lastly, the Tribunal will not allow review on the grounds that it has omitted to comment on pleas submitted by the parties. Otherwise it would have to pass express judgment on all such pleas, even if they are plainly immaterial. The purpose of an application for review is not to compel the Tribunal to pass judgment on irrelevancies.

> 3. *Admissible pleas in favour of review*
>
> Other pleas in favour of review may be allowed if they are such as to affect the Tribunal's decision. They include an omission to take account of particular facts; a material error, i.e. a mistaken finding of fact which, unlike a mistake in appraisal of the facts, involves no exercise of judgment; an omission to pass judgment on a claim; and the discovery of a so-called 'new' fact, i.e. a fact which the complainant discovered too late to cite in the original proceedings.
>
> ...
>
> 5. *Review and correction*
>
> Where a plea is not such as to affect its decision, the Tribunal will decline not only to reconsider its judgment but also to correct the summary of facts and its legal reasoning. It would lay an undue burden on a tribunal to require it to correct any flaws which had no effect on its decision."

4. These general principles have been followed by the Tribunal throughout the years. In Judgment 1825 (*in re* Belser No. 2 and others) delivered on 28 January 1999, the Tribunal declared:

> "The Tribunal's judgments are final and binding. They are not subject to appeal. The Tribunal will not entertain applications for revision or review except in the most unusual circumstances such as fraud or the discovery of conclusive new evidence which could not have been brought forward before. The stability of judicial procedures and the need to bring an end to litigation require that parties must accept the result they obtain even when they are unsatisfied with it. Where both parties have had a full opportunity to present their case and where no new and previously undiscoverable factual element is brought forward the principle of *res judicata* prevents the reopening and rearguing of cases already decided."

5. The issues raised by the complainant are divided into five categories: he contends that the Tribunal (1) disregarded some facts; (2) made a material error; (3) failed to rule on a claim; (4) failed to give reasons for its decision, therefore breaching Article VI of the Tribunal's Statute; and (5) was not impartial.

*Disregard of certain facts*

6. The complainant contends that the Tribunal should have mentioned the contents of the replies or notes addressed by him to his supervisors. The Tribunal was under no such obligation. The replies and

notes were provided to the Tribunal and it had ample opportunity to appraise this evidence and in fact did so. Whether the contents were crucial was left to the Tribunal to decide. The complainant apparently believes that the Tribunal made a mistake in appraising the importance of this evidence. As has been shown above, this is not a plea that gives rise to review.

*Error of fact*

7. Judgment 1907 contains the following passage under 4:

> "At the initiative of the Director General, the complainant was accorded an interview with the President of the International Committee of the OIE, who also presides over the Administrative Commission, on two successive days, 18 and 19 February 1999. At those meetings the complainant continued to insist, as he had on a number of previous occasions, that he had discovered irregularities in the accounts of the Office's regional office for the Americas, notwithstanding the fact that those accounts had been examined by both the internal and external auditors of the OIE and had specifically been found to be in order."

8. In fact, the audit reports in question were not delivered to the Director General of the OIE until April 1999 – that is after the complainant had met with the President of the International Committee of the OIE and had been dismissed by the Director General. Thus, the Tribunal's statement as quoted is erroneous.

9. But the Tribunal's case law does not merely require that an error be found in order to justify reviewing its decision. The error must be material and be "such as to affect the Tribunal's decision". This is clearly not the case here as, whatever the date of the auditors' reports, the complainant's allegations of accounting irregularities were incorrect and were conclusively found to have been so.

### *Failure to rule on a claim*

10. In his pleadings for his first case the complainant alleged that the OIE had made false accusations regarding an "OIE-Thailand agreement". Judgment 1907 did not deal with or mention this allegation since it was thought not to be relevant to the impugned decision. The complainant consequently alleges that the Tribunal failed to address one of his claims. It is noteworthy that no reference to the allegations concerning this agreement is made in the claim for relief either in the brief or in the complaint form completed by the complainant. The allegation was merely a plea and not a claim. The Tribunal did not need to address that plea if it felt it was unnecessary to do so.

### *Breach of Article VI of the Tribunal's Statute*

11. The complainant has not demonstrated that the Tribunal failed to give its reasons. As submitted by the OIE the reasons for rejecting the complainant's claim in this regard clearly appear from the judgment. That the complainant does not agree with them is of course of no consequence.

### *Lack of impartiality*

12. Lack of impartiality in a tribunal is a serious matter and an allegation of this sort should be neither made nor taken lightly. It is, like any other breach of the principles of natural justice, a proper ground for seeking review of a judgment. Impartiality can be evaluated either subjectively or objectively.

13. The complainant does not assert elements necessary to support a subjective test. He does not prove any of the personal convictions of the judges. A subjective test cannot apply in the present case, in view of the circumstances, for there is no evidence that one of the judges actually has a bias. In fact, the arguments brought forth could only serve, if successful, to establish an objectively reasonable apprehension of bias, i.e. the objective test.

14. The determining element in that test is whether the apprehensions of the interested party can be considered as being objectively justified. The complainant alleges that the following facts create a reasonable apprehension of bias on the part of the Tribunal.

15. The President of the Tribunal, Mr Michel Gentot, was one of the judges who adopted Judgment 1907. He is a very senior public official in France and was formerly President of the Litigation Section of the French *Conseil d'Etat*, the ultimate and highest appellate administrative tribunal in that country. He is also President of the French national committee for the protection of personal data (*Commission nationale de l'informatique et des Libertés, CNIL*). He was the Secretary General, later Director, of the Paris Political Studies Institute (*Institut d'Etudes politiques*) more than thirteen years ago, from 1978 to 1987.

16. The OIE's legal advisor, a French civil servant, was a lecturer at the Paris Political Studies Institute from 1975 to 1984.

17. The OIE's auditor, along with Mr Gentot, were both alumni of the French *Ecole nationale d'administration*.

18. The OIE's Director General and the Head of the Administrative and Financial Department are both French nationals, as of course is Mr Gentot.

19. Mr Justice Hugessen, who also signed Judgment 1907, is a Canadian national and a judge of the Federal Court of Canada. The President of the International Committee of the OIE was a Canadian senior civil servant. The Deputy Head of the Office's Administrative and Financial Department is also Canadian.

20. The complainant's subjective opinion that the judges were not impartial is not decisive. The question is whether a reasonably informed

person, viewing the matter realistically and having thought the matter through, would apprehend any bias. It is clear that such a person would not do so in the present case.

21. The complainant's first argument is that because Mr Gentot is of French nationality, along with a few of the OIE's senior officers, its auditor, its Director General and one of the officers of the Department to which the complainant belonged, there are grounds for a reasonable apprehension of bias. This is simply unacceptable. International organisations by definition have no nationality and their officers and employees are drawn from citizens of many countries; it is the organisations and not their officers who appear as defendants in cases before the Tribunal and the nationality of the judges who hear those cases is wholly irrelevant.

22. The foregoing considerations effectively dispose of the allegations against Mr Justice Hugessen, as common nationality was the only element alleged by the complainant with regard to that judge. Consequently he has agreed to sit on the present matter. There is an important principle at stake here: applications for review are normally heard by the same panel which rendered the original decision; a complainant cannot, by making wholly frivolous and unsubstantiated allegations force one or more members of the panel to recuse themselves.

23. The concerns expressed by the complainant with regard to the fact that Mr Gentot and the OIE's auditor both attended the same school and that Mr Gentot was Director of an institute at which the Office's legal advisor taught are equally without merit. The first part of the complainant's concern does not appear to be reasonable. If his opinion were to be followed, students having attended an institution should be prevented from judging cases in which the names of other students of the same institution appear. Furthermore, one need only point out the fact that these two persons were not graduates of the institution from the same academic year to make any

reasonable apprehension of bias disappear. As for the purported link between Mr Gentot and a former lecturer who is now legal advisor for the OIE, the latter was not directly implicated in the litigation. The complainant has failed to adduce any evidence that would lead a well-informed third party to reasonably apprehend bias on the part of Mr Gentot.

24. The other arguments deal with matters that are wholly unrelated to the complainant's claim and cannot possibly lead someone to suspect bias. The complainant objects to the fact that there is no appeal available to him beyond the Tribunal. There is nothing unusual about that, especially when one bears in mind that the Tribunal is itself an appellate body.

25. The application for review must in consequence be dismissed.

## DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 16 November 2000, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Mella Carroll

MELLA CARROLL

James K Hugessen

JAMES K. HUGESSEN

Flerida Ruth P. Romero

FLERIDA ROMERO

CATHERINE COMTET

International Labour Organisation
Administrative Tribunal
Geneva

**Organisation internationale du Travail** **International Labour Organization**
***Tribunal administratif*** ***Administrative Tribunal***

# NINETIETH SESSION

***In re* Kirsch** **Judgment No. 2022**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr William Joseph Kirsch against the International Telecommunication Union (ITU) on 11 October 1999 and corrected on 28 October and the ITU's reply of 2 December 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States born in 1956, joined the staff of the ITU in June 1998 on a two-year fixed-term appointment as Head of External Affairs at grade P.5.

On 8 March 1999 the General Secretariat Management Committee produced a summary record of a meeting it held on 1 March. Paragraph 3.2 of that document related to the ITU's policy regarding invitations to speak at external events. It mentioned a proposal that the External Affairs invitations database should be made available on the internal web.

On 30 March 1999 the ITU published Office Memorandum No. 12 entitled "Policy on invitations to speak at external events". It specified that the External Affairs section would become "the central focal point for invitations" and that all invitations to speak on behalf of the ITU should be forwarded to that section for processing and entering on the database. The complainant wrote to the Secretary-General on 16 April saying that, by virtue of that memorandum, new responsibilities had been assigned to him. He said he equated it with an administrative decision to assign him "D.1-level review responsibilities" which, prior to the issuing of the memorandum, were assumed by the Senior Level Management Committee (SLMC), a consultative body composed of elected and other high-level officials. He, therefore, requested a review of the decision contained in the memorandum, and a special post allowance at D.1 level.

By a letter of 2 June 1999 the Secretary-General acknowledged receipt of that letter and numerous other requests for review received from the complainant in April and May. The following day, the complainant submitted an appeal to the Appeal Board. He is challenging the implied rejection of his appeal.

B. The complainant contends that his complaint is receivable because of the ITU's failure to take a decision on his appeal of 3 June 1999.

He submits that the ITU did not set objectives for him at the time he took up employment and had failed to keep the classification of the post "accurate and up-to-date". At its meeting of 1 March 1999 the ITU General Secretariat Management Committee assigned him "additional" responsibilities and duties for implementing ITU policy on invitations to speak at external events. Office Memorandum No. 12 of 30 March 1999 constituted the administrative decision to assign those additional tasks to him. Prior to that date the policy governing the invitations was implemented by the SLMC which included senior officials at grades D.1 or D.2.

Citing the Tribunal's case law, he contends that the ITU failed to comply with Staff Regulation 3.8 regarding the grant of the special post allowance. From the wording of the Management Committee's summary record of 8 March 1999 and the subsequent office memorandum it is clear that duties of at least D.1 in level were to be transferred to a "central focal point" – meaning to him as Head of External Affairs. Since the transfer of duties was for a period of at least four weeks he contends that the ITU should pay him the allowance. Its failure to do so constitutes an affront to his dignity.

He therefore claims a "D.1 special post allowance", 25,000 Swiss francs in moral damages and 12,000 United States dollars in costs.

C. In its reply the Union objects to the receivability of the complaint. In a letter he sent to the Secretary-General on 5 July 1999, the complainant wrote in his closing sentence: "In view of its inclusive nature this letter replaces and supersedes all my previous communications of every kind". Given the precise wording of that sentence, it concluded that the complainant was withdrawing his requests for review, including the one submitted to the Appeal Board on 3 June. The complainant was absent from the office from 12 July to 19 September, with the exception of 10 August, and his whereabouts were unknown. It could not, therefore, obtain clarification from him regarding his appeal.

On the merits the Union contests that additional responsibilities were assigned to the complainant through Office Memorandum No. 12. The complainant has misinterpreted the procedure set out therein and his argument is based on a "simplistic analysis" of how those responsibilities affect the grading of his post. The arrangements detailed in the memorandum can have no effect on the post which he occupied as Head of External Affairs for two reasons. First, although the memorandum indicated that his section would become a central focal point, it also specified that there would be a sharing of responsibilities between the Secretary-General's Office and the Directors of the three Bureaux. Secondly, the aim of the memorandum at issue was primarily to organise more efficiently the decision-making process regarding invitations to speak at external events. The processing of the invitations was already part of the remit of the Head of External Affairs, and this was specified in the job description pertaining to his post. The memorandum therefore had no impact either on the assignments listed in the job description or on the level of classification of his post. Accordingly, there were no grounds for granting him the special post allowance, nor for awarding him moral damages and costs.

## CONSIDERATIONS

1. The complaint arises from a request the complainant made to the Secretary-General that a special post allowance be granted to him on account of additional responsibilities deriving from, in his opinion, the procedures set out in Office Memorandum No. 12 dealing with invitations to speak at external events. The complainant asserts that the memorandum assigned responsibilities to him which were previously undertaken by the Senior Level Management Committee. Therefore, he should have been granted a special post allowance by virtue of Staff Regulation 3.8 b).

2. The Union is of the view that the complaint is based on a misinterpretation of the procedures established by the office memorandum. It asserts that the arrangements described in the memorandum have no impact on the grade of the complainant's post. First, the memorandum attributes the overall supervision of the procedure for processing invitations to the External Affairs section; however, it also institutes a sharing of responsibilities between the Secretary-General's Office and the Directors of the three Bureaux. Secondly, its objective is to implement a more efficient decision-making process on invitations to speak at external events. The processing of invitations, particularly the preparation of the replies thereto, was already within the mandate of the Secretary-General's Office and the External Affairs section as stipulated in the job description for the complainant's post.

3. The ITU considers that the complaint is not receivable for the following reasons. The complainant submitted to the Secretary-General a great number of requests for reconsideration of various administrative decisions and he filed three appeals with the Appeal Board. But on 5 July 1999 he sent a letter which he said superseded all his previous correspondence. From the text of that letter, the ITU concluded that the complainant was withdrawing all his requests for reconsideration and his appeal. For that particular reason, the Union is of the opinion that the present complaint is not receivable as the complainant withdrew the appeal he had filed with the Appeal Board.

4. The Union also submits that it was not possible to verify the complainant's exact intentions with regard to his appeal: from 12 July to 19 September 1999, with the exception of one day, the complainant was absent from the office. During that time he remained out of contact with the ITU and the Union was unsuccessful at contacting him by registered mail.

5. As to the receivability of the complaint, the Tribunal notes the complainant's letter of 5 July 1999 to the Secretary-General, in which he said: "In view of its inclusive nature this letter replaces and supersedes all my previous communications of any kind". It is necessary to understand the meaning of this declaration from the context of the entire letter.

6. In the letter referred to above, in which he offers to resign as of the end of March 2000, the complainant was attempting to reach a mutual agreement between himself and the Union. It appears that he was trying to negotiate an arrangement favourable to his personal situation.

7. The behaviour of the complainant might appear to have led to the interpretation that he was withdrawing his appeal because he did not diligently pursue it through the internal procedures open to him. The Tribunal recalls what it said in Judgment 1970, *in re* White, under 9: "A complainant cannot sit back and do nothing when an appeal is lodged. He must pursue the appeal diligently".

8. A complainant is limited to filing his complaint only after exhausting all internal means of redress. If he did withdraw his appeal he did not exhaust all internal means of redress.

9. Since an exact interpretation of the letter of 5 July 1999 is uncertain, the Tribunal considers it necessary to examine the complaint on the merits which can only result in its dismissal.

10. The whole of the complaint rests upon the following two paragraphs of Regulation 3.8 of the Staff Regulations:

"a) A non-pensionable special post allowance shall be paid to any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade ...

b) Exceptionally, when additional temporary work of at least four weeks' duration, e. g. for conferences, has to be provided for, the Secretary-General is authorized to pay the special post allowance for a period not exceeding six months and starting from the date on which the staff member takes up duties the level of which corresponds to a higher grade."

11. In order to succeed under Regulation 3.8 a) the complainant must point to "an existing post" of which he was assigned the duties. He fails to do so. At best, he suggests that his "new" duties were previously performed by a committee, some or all of whose members may have held posts ranked superior to his. This is clearly not enough to meet the very specific requirements of that provision.

12. Under Regulation 3.8 b) the complainant fares no better. First, the Tribunal notes that the text is purely permissive and does not purport to create any rights. Secondly, the text is clearly designed to address only temporary situations, as is well illustrated by the example given of a conference; there was nothing temporary about what the complainant was asked to do. And finally, those so-called "new" duties appear to the Tribunal to be wholly compatible with the duties already attached to the post he held as Head of External Affairs.

13. The claim must accordingly be dismissed as must his claim for damages.

## DECISION

For the above reasons,

The complaint is dismissed.

**In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

**MICHEL GENTOT**

**JAMES K. HUGESSEN**

**HILDEGARD RONDÓN DE SANSÓ**

**CATHERINE COMTET**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

# NINETIETH SESSION

***In re* Bajaj** **Judgment No. 2023**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the complaint filed by Mr Krishan Kumar Bajaj against the World Health Organization (WHO) on 10 January 2000 and corrected on 25 January, the WHO's reply of 17 April, the complainant's rejoinder of 23 May and the Organization's surrejoinder of 24 August 2000;**

**Considering Article II, paragraph 5, of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which neither party has applied for;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, an Indian national born in 1948, joined the WHO on 12 July 1979 as a clerk typist at grade ND.3, step 1, in the Organization's Regional Office for South-East Asia (SEARO) in New Delhi. He was promoted to ND.4, step 1, on 1 February 1985. At 1 July 1997 his grade was ND.4, step 13.**

**On 7 April 1998 the complainant wrote to the SEARO Administration protesting about his salary step, because he was receiving less in salary than two colleagues who were promoted to ND.4 later than he was. He indicated that one colleague (Mr T.) was promoted to that grade in July 1985 and the other (Mr G.) was promoted in July 1992 but both were currently two steps ahead of him in the salary scale. On the grounds that**

an adjustment had once been made to Mr T.'s salary he asked the Administration to grant him grade ND.4, step 3, retroactively as from 1 February 1985 – the date of his promotion. Having reviewed his request the Regional Personnel Officer told him in a memorandum of 5 June 1998 that there was nothing amiss with the way in which his step had been determined when he was promoted; Mr T.'s case involved different facts and the complainant's situation was not the same.

The complainant filed an appeal with the Regional Board of Appeal which partly found in his favour. It too held the view that his case could not be compared to that of Mr T. It recommended, however, that his salary should be fixed on a par with Mr G.'s from the time in 1992 when the divergence in salary had first become apparent.

In a letter of 9 April 1999 the Regional Director rejected his appeal and the complainant appealed to the Headquarters Board of Appeal. In its report of 25 September 1999 the Board said that the disparity in steps between the complainant and Mr G. had stemmed from the change incorporated in the version of Staff Rule 320.2* which came into force on 1 July 1990. Whereas prior to that date an increase in net base salary corresponding to one step in the new grade was granted on promotion, the subsequent version provided for an increase equivalent to the granting of two steps in the grade held by the staff member before promotion. The Board held that all the relevant rules had been correctly applied, and recommended the rejection of his appeal while urging that the

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*Before 1 July 1990 Staff Rule 320.2 read in part:

> "On promotion to a higher grade the net base salary of a staff member shall be fixed at the lowest step in the new grade that will provide ... an amount corresponding to one full step in the new grade more than he would have received without promotion..."

In its version of 1 July 1990 it read:

> "On promotion to a higher grade the net base salary of a staff member shall be fixed at the lowest step in the new grade that will provide an increase in net base salary at least equal to that which would have resulted from the granting of two steps within his present grade."

Administration should pay careful attention to the "possible unintentional consequences of changes in the Staff Rules". On 27 October 1999 the Director-General accepted the Board's recommendation and dismissed his appeal. That is the decision which is now under challenge.

B. The complainant pleads unequal treatment. He regards it as an "anomaly" that two officials who were promoted to grade ND.4 after him are now at a higher step and receive a higher salary than him. He sees no legal justification for the argument that his colleague, Mr G., is two steps ahead of him solely as a result of the change in Rule 320.2, the more so because he was promoted more than seven years before that official. The fact that this colleague has been getting a higher salary violates the principle of equal pay for work of equal value. It constitutes breach of the terms of his contract and conditions of service which lead him to expect "fair and just treatment".

He draws attention to Judgment 1190, *in re* Bansal (No. 2) and others, in which it was said that the staff members who filed the complaint "were passed over in step by someone who had been promoted years later than they". The Tribunal, he says, took a stand on the matter by saying that the Organization was to blame for the "odd result", and that step increases "must depend on the quality of ... services" and not on "improper changes" made by the Organization in its rules. In ruling on that case the Tribunal was applying a general rule with which the WHO Administration is now bound to comply.

Referring to the case of his colleague, Mr T., the complainant contends that that official had his salary adjusted and was granted a lump-sum payment as a result of receiving a salary lower than that due.

The complainant seeks the quashing of the Director-General's decision of 27 October 1999. He wants his pay from 1 July 1992 to be on a par with that of Mr G. who at that date was on step 10 in grade ND.4, and wants to receive back pay and allowances. He also seeks compensation for moral injury and costs.

C. In its reply the Organization asserts that the principle of equality of treatment was not violated: the situations of the complainant and his two colleagues were not the same.

The difference in step between the complainant and Mr G., who both joined the Organization on the same day, came about partly because a different version of Staff Rule 320.2 was in force at the time when each was promoted and partly because Mr G. was able to defer the date of his promotion to take advantage of a within-grade increase. The 'old' version of Rule 320.2, which governed the complainant's promotion, allowed for an increase of just one step, whereas the subsequent version, in force after 1 July 1990 and applicable at the time of Mr G.'s promotion to ND.4, allowed for an increase of two steps. The complainant was not in the same position in law as his colleague and therefore was not discriminated against. The grade and step for both of them were established correctly.

The complainant's arguments in respect of his other colleague, Mr T., are unfounded. The latter, who joined the Organization in June 1974, five years and one month before the complainant, received a two-step meritorious increase after twenty years of service. On 1 July 1999 the complainant received the same meritorious increase; since then they have been at the same step and grade. Mr T. was paid a "temporary personal transitional allowance" to compensate him for receiving slightly lower pay following a promotion, owing to a revision in the salary scale, but the payments he received did not affect his grade or step; he was subsequently paid a one-off lump-sum payment. Their situations are not therefore comparable.

The defendant argues that there was no breach of the relevant Staff Rules and notes that the complainant does not contend otherwise. His reliance on Judgment 1190 is misplaced: the situation at issue in that judgment was different from the one giving rise to the present complaint, inasmuch as the case involved the effects on all General Service staff of a simultaneous application of the results of a salary survey which had led to certain staff members being paid less than others who were on lower grades and had less seniority. Although the WHO had discretion in the implementation of the salary survey at issue in Judgment 1190, the adjustment of steps on promotion pursuant to Staff Rule 320.2 is not a discretionary matter.

D. In his rejoinder the complainant contends that Judgment 1190 is relevant to his case. The Organization is distorting that judgment, and is simply "hiding" behind its rules. In his view, the general principles of law and equity prevail over the provisions of the Staff Rules. Where an inequitable situation results from a change in the rules, the defendant should provide for "redress of a resultant hardship" in certain individual cases. Similarly, when the determining of pay under Staff Rule 320.2 results in an anomaly, the situation should be suitably remedied. He views the situation that has arisen as "unfair, unreasonable and illogical".

He does not regard the matter of the meritorious service increase as relevant in the context of his complaint. The important issue is how Mr T.'s salary could be set at a higher step in ND.4 when his colleague's promotion to that grade occurred several months after his own. Since the Organization concedes that the colleague in question was given a "temporary personal transitional allowance" it could apply a similar procedure and grant him parity of salary with Mr G., as claimed, from 1 July 1992.

E. In its surrejoinder the Organization holds that it accurately interpreted Judgment 1190. It denies that it was "hiding" behind its rules when it determined the complainant's salary. It applied those in force at the relevant time.

It disputes the complainant's argument that principles of "equity and general law" should override provisions in the Staff Rules, and says that in the circumstances of the present case that argument is not upheld by the case law of the Tribunal. The determining principle is that staff members in similar circumstances must be treated similarly. Those circumstances can change when there is a change in the rules, and the principle of equality of treatment may not then apply.

Since the complainant is seeking parity of salary with Mr G., the Organization questions the relevance of his arguments regarding Mr T.'s situation. The payment of a transitional allowance to the latter can in no way justify permanently granting the complainant an additional step. The allowance was paid to Mr T. alone to compensate him for a decrease in his salary following a promotion.

## CONSIDERATIONS

1. The complainant joined the WHO's Regional Office for South-East Asia (SEARO) on 12 July 1979 at grade ND.3, step 1, at the same time as Mr G. who was also at ND.3, step 1. On 1 February 1985 the complainant was promoted to grade ND.4, step 1. On 1 July 1992 Mr G. was promoted to the same grade at step 10. At that time, the complainant was at step 8. He complains that someone who was promoted seven years after him is two salary steps ahead of him.

2. He also complains that Mr T. who was promoted to grade ND.4 on 1 July 1985, five months later than him, was two steps higher than him in 1992.

3. The position is that when the complainant was promoted in 1985 Staff Rule 320.2 provided that on promotion the net base salary of a staff member would be fixed at the lowest step in the new grade that would provide an increase of an amount corresponding to one full step in that grade. The rule was changed on 1 July 1990 so that the increase in salary on promotion corresponded to two steps in the grade held before promotion. Also Mr G. was permitted to defer his promotion for two months, until his next annual step increase was due, in order to take advantage of that increase. This resulted in the anomaly whereby Mr G. was paid two salary steps more than the complainant.

4. The facts in relation to Mr T. are that he joined SEARO five years and one month before the complainant. On completing twenty years of service he received a meritorious two-step increase under Staff Rule 555.2. (He also received a "transitional allowance" and a lump sum.) On 1 July 1999 the complainant received the same meritorious increase and as from that date they have been at the same step.

5. In the internal appeal process the Regional Board of Appeal recommended on 1 March 1999 that the complainant's salary should be "fixed at par" with Mr G.'s but this recommendation was not followed by the Regional Director. His case went to the Headquarters Board of Appeal, which reported on 25 September 1999. It found no evidence of failure to apply the provisions of the Staff Regulations and Rules correctly or breach of the terms of the complainant's contract. It recommended that the appeal be dismissed. By a letter of 27 October 1999 the Director-General accepted the Headquarters Board's recommendation. This is the decision under challenge.

6. In his complaint the complainant seeks parity of payment with Mr G., compensation for moral injury, and costs.

7. The complainant does not claim that the Organization was not entitled to change its rules; or that former Staff Rule 320.2 was incorrectly applied to him; or that the revised Staff Rule was incorrectly applied to Mr G.; or that Mr G. was not entitled to defer his promotion for two months to take advantage of the within-grade step increase which was due in July 1992. He cites Judgment 1190 (*in re* Bansal No. 2 and others) dealing with anomalies arising from the application of the results of a salary survey to General Service staff, and claims that the fact that Mr G. gets a higher salary than him violates the principle of equal pay for work of equal value and also infringes the terms of his contract and conditions of service which lead him to expect "fair and just treatment".

8. As regards Mr T., the difference of within-grade steps was due to the two-step increase he was granted for twenty years of meritorious service, which the complainant has since obtained too. The Tribunal accepts that the payment which Mr T. received in 1994 was not an adjustment in grade or step, but was a lump sum he received following the cessation of his personal "transitional allowance". Therefore no point arises in relation to Mr T.

9. In relation to the difference in the salary steps of Mr G. and the complainant, since the Staff Rules were changed after the complainant's

promotion the question of equality of treatment does not arise: the complainant and Mr G. were not in similar circumstances (Judgment 409 *in re* de Gregori). The material rules are those that obtain at the time of promotion (Judgment 674 *in re* Wäckerlin).

10. The aforesaid Judgment 1190 is not a case in point. It concerned the application of the results of a salary survey whereby persons junior in grade and with less seniority earned more than the complainants. The principle of equal pay for work of equal value applies to the grading of posts (WHO Manual: Part II, section 1, paragraphs 20 and 30.1). Step increases within a grade are not contrary to the principle of equal pay. The complainant's step in grade was correctly determined in accordance with the rules in force at the time. After the change in Rule 320.2 Mr G.'s step in grade was also correctly determined. The circumstances were different and there was no breach of equality of treatment or breach of the terms of the complainant's contract of employment.

## DECISION

For the above reasons,

The complaint is dismissed.

**In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

**MICHEL GENTOT**

Mella Carroll

**MELLA CARROLL**

Flerida Ruth P. Romero

**FLERIDA ROMERO**

**CATHERINE COMTET**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

# NINETIETH SESSION

**In re Skelly (No. 2)** **Judgment No. 2024**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs Jacinta Marcy Skelly against the European Patent Organisation (EPO) on 6 August 1999 and corrected on 19 October, the EPO's reply of 17 December 1999, the complainant's rejoinder of 7 July 2000, and the Organisation's surrejoinder of 29 September 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Irish national born in 1948, is an examiner at grade A4 in Directorate-General 2 (DG2) of the European Patent Office, the EPO's secretariat. DG2 is responsible in the main for the substantive examination of patent applications. The work of patent examiners at the EPO is rated by a system of points and fractions of points, which is used by the Office in the evaluation of an examiner's output. Originally, an examiner was awarded one point for processing a "demand for international preliminary examination" under Chapter II of the Patent Cooperation Treaty ("PCT Chapter II"). If this demand was subsequently converted into a European patent application ("Euro-PCT") another full point was awarded for a completed file.

In 1992 that system was reassessed and the staff were notified in a note of 26 January 1993 that the points awarded for a PCT Chapter II application would be reduced to 0.75 and those awarded for a Euro-PCT application would be reduced to 0.55. This reduction of points was successfully challenged in a complaint leading to Judgment 1488 (*in re* Schorsack) of 1 February 1996, in which the Tribunal found that the EPO had not consulted its General Advisory Committee (GAC) before announcing and implementing the changes. As a result of this judgment, the note of 26 January 1993 was withdrawn.

On 23 May 1996 the President of the Office notified all examining staff in DG1 and DG2 that, following consultations with the GAC and the Vice-Presidents of these two directorates, a revised points structure, awarding 0.75 points for PCT Chapter II and 0.55 points for Euro-PCT applications, would be implemented as from 1 June 1996. In August 1996 the complainant, along with 434 other examiners, lodged two appeals – Nos. 52/96 and 53/96 – against this decision. Both appeals sought to have the decision set aside and confirmation that the points system in force up to 31 May 1996 would continue to apply.

Staff dissatisfaction with the change led to lengthy discussions between the President and staff representatives in 1996 and 1997 and, following industrial action, on 12 September 1997 the President submitted a "compromise" proposal to the GAC for an opinion. The proposed changes, which were subsequently adopted, awarded 0.9 points for PCT Chapter II and 0.4 points for Euro-PCT applications; in certain cases a full point could be awarded for Euro-PCT dossiers. The new points system was to become effective as of 1 January 1998. On 6 November 1997 the President communicated this decision to the staff, along with the information that the system set out in the notice of 23 May 1996 would not be applied for the period from 1 June 1996 to 31 December 1997.

On 2 March 1998 a notice was published in the EPO *Gazette* in which the Administration stated that the President's decision of 6 November 1997 had the effect of withdrawing the decision challenged in appeals 52/96 and 53/96; consequently, the appeals were now considered to be "without subject" and the file would be closed. Appellants who disagreed were given three months to indicate why they intended to pursue the appeals. On 13 May 1998 the complainant wrote to the Director of Personnel Development saying that she was pursuing her appeals on the grounds that the decision of 6 November 1997 had not given her full satisfaction because she had requested that the points system in force up to 31 May 1996 be reinstated "without a time limit".

The Administration believed that her claim to reinstatement of the previous system "without a time limit" was a new claim and argued that her appeals were irreceivable; however, the Appeals Committee found them to be receivable. Nevertheless, in its opinion of 19 April 1999 the Committee unanimously recommended dismissing her appeals as unfounded. On 5 May 1999 the Director of Personnel Development informed the complainant that the President of the Office rejected her appeals. That is the impugned decision.

B. The complainant submits that her complaint addresses the question of "whether the new system fairly apportions points for the PCT procedure as a whole and also for each action within that procedure."

She argues that the changes to the points system were decided in an arbitrary and discriminatory manner. There is no evidence that the Administration carried out an objective examination of the work involved before it modified the points awarded. While she admits that the previous system was over generous, the new one does not take into account the fact that not all patent examiners have the same percentage of each type of application. Consequently, the system has created inequality of treatment between examiners in different fields. Although another remedy has been proposed by staff representatives, the Administration has rejected it without any reasoned argument. She also questions whether the required consultations took place prior to modifying the points system.

She requests the Tribunal to quash the President's decision rejecting appeals 52/96 and 53/96 contesting the system of the points for the PCT examination procedures, thereby "re-establishing the former points system, until a mutually agreed system can be found".

C. The EPO replies that the complaint shows no cause of action and is therefore irreceivable. The complainant received satisfaction on her appeals by the President's decision of 6 November 1997. In those she requested the withdrawal of the points system announced on 23 May 1996 and confirmation that the system in force up to 31 May 1996 would continue to apply. She did not request that the former system be maintained "without a time limit", nor did she request that it be maintained until a mutually agreed solution could be found. If she wished to challenge the points system that the President announced on 6 November 1997, she should have done so within three months of notification, but she did not. Even if her letter of 13 May 1998 could have been considered a "new" appeal, it was out of time and the Appeals Committee erred in considering it as coming under her "old" appeals.

Subsidiarily the Organisation contends that, given the fact that the President's decision of 6 November 1997 resulted in the withdrawal of the points system announced on 23 May 1996, there is no reason to consider the legality of that system. The Appeals Committee found that the system of calculating points was something that the Administration had discretionary authority to change. The fact that the new system was a result of a compromise between the staff and the Administration did not mean that it was unlawful or arbitrary.

D. In her rejoinder the complainant submits that the EPO has been misleading in its rendering of the facts. She asks the Tribunal to find her complaint receivable; the President has not truly rescinded his note of May 1996 because the overall number of points awarded has remained 1.3. Therefore, it cannot be argued that his note of November 1997 constitutes a new decision. Since the EPO objects to the part of her claim that the old system be maintained "until a mutually agreed system can be found" she now withdraws that part of it.

She agrees with the Organisation's argument that the old system lacked accuracy and therefore gave rise to unfair and unequal treatment. However, she argues that the new system has not remedied this situation. Furthermore, the EPO has not addressed her arguments but has resorted, in her view, to levelling personal criticism at her. Lastly, she contends that the President has broken his promise of obtaining staff consent, a requirement under the "compromise" proposal, and that consequently, the GAC consultation was fundamentally flawed.

E. In its surrejoinder the Organisation submits that the distribution of points changed between the old and new systems, even though the total number of points awarded remained the same. It presses its pleas on receivability. The complainant never filed an appeal against the decision of 6 November 1997. On the merits the EPO asserts that she has failed to establish that the new points system is not accurate.

## CONSIDERATIONS

1. At issue in this complaint are the changes in the points system of rating the output of examiners carrying out examination work under Chapter II of the Patent Cooperation Treaty ("PCT Chapter II") and under the European Patent Convention ("Euro-PCT").

2. In addition to examining and granting European patent applications, the EPO receives international applications under PCT Chapter II and under Euro-PCT. For performance assessment purposes, the work of patent examiners is rated by a system of points and fractions of points. Originally, examiners were awarded one point for the processing of a PCT Chapter II "demand for international preliminary examination". If the demand was converted into a Euro-PCT application, the examiners were awarded another point.

3. The points system was reassessed in 1992 and by a note of 26 January 1993 it was amended. The points allowed were reduced to 0.75 for a PCT Chapter II procedure and 0.55 for a Euro-PCT one. These amendments were the subject of a complaint and in Judgment 1488 the Tribunal concluded that the impugned decision was made in breach of the rules. In fact, the Tribunal found that the General Advisory Committee (GAC) had not been consulted as it should have been. The decision to amend the points system was thus set aside and the previous system was reinstated.

4. The President of the Office then requested the GAC to give an opinion on the basis of the original note dated 26 January 1993. On 23 May 1996 the President issued a decision whereby he reduced the points to 0.75 for a PCT Chapter II procedure and 0.55 for a Euro-PCT one with effect from 1 June 1996.

5. In August 1996 the complainant, together with 434 other examiners, lodged two internal appeals (Nos. 52/96 and 53/96) against this decision. In both appeals, the complainants requested that the decision of 23 May 1996 be set aside and that the points system in force up to 31 May 1996 continue to apply. Subsequent to discussions with staff representatives in 1996 and 1997 and following industrial action, on 12 September 1997 the President submitted a new proposal concerning the rating system to the GAC for an opinion. On 6 November 1997 he issued yet another decision by which he informed examiners that as of 1 January 1998 they would be credited with 0.9 points for PCT Chapter II and 0.4 points for Euro-PCT procedures (and in certain cases, a full point instead of only 0.4). They were also informed that the points system set out in the notice of 23 May 1996 was rescinded and would not be applied from 1 June 1996 to 31 December 1997. Instead, the previous system would prevail.

6. On 2 March 1998 the Administration published a statement in the *Gazette* that appeals 52/96 and 53/96 had become "without subject". Appellants who disagreed were requested to indicate their disagreement within three months from the date of publication, at the same time stating their reasons for pursuing the appeal.

7. On 13 May 1998 the complainant responded by stating that she was pursuing her appeals because she considered she had not obtained satisfaction: in her view her appeals sought reinstatement "without a time limit" of the points system in force up to 31 May 1996. Appeals 52/96 and 53/96 were referred to the Appeals Committee for an opinion and the latter concluded that the appeal was receivable because it was directed against the new points system which had been introduced as from 1 January 1998. However, it recommended that the appeals be dismissed as unfounded. On

5 May 1999, the President rejected the complainant's appeals. That is the impugned decision.

8. In the present case, the complainant relies on the recommendations of the Appeals Committee as to the issue of receivability. The Committee was of the view that the purpose of the appeal against the President's note dated 23 May 1996 was to confirm that the points system in force up to 31 May 1996 continued to apply. A renewed appeal against changes to the former system, which was effective from 1 January 1998, was unnecessary as the publication in the *Gazette* requested that appellants indicate their reasons for pursuing the appeal. The Committee found that the statement in the *Gazette* should have been taken to mean that the pending appeals could be "pursued" if the new points system was not acceptable and the appeal was therefore not considered settled. The Committee also found that the statement in the *Gazette* opened up a renewed possibility for appealing, within a specified time limit, against the new points system which had entered into force on 1 January 1998. The Committee considered that the complainant's letter of 13 May 1998 was a new appeal within that time limit.

9. The Tribunal finds that there is no doubt that the complainant's appeal is irreceivable. In this appeal the complainant impugned the President's decision of 23 May 1996. That decision reduced the points awarded to 0.75 for a PCT Chapter II procedure and to 0.55 for a Euro-PCT procedure from 1 June 1996. It was revoked on 6 November 1997 when the President informed the examiners that as of 1 January 1998, 0.9 points would be credited for PCT Chapter II and 0.4 points for Euro-PCT applications. The note of 6 November 1997 clearly states that the system set out in the note of 23 May 1996 would not be applied from 1 June 1996 to 31 December 1997 and that the previous system would be applicable. The decision of 23 May 1996 is, therefore, no longer in effect and has produced no consequences. Since her internal appeals filed in August 1996 requested that the 23 May 1996 decision be set aside, and that the points system in force up to 31 May 1996 continue to apply, the President's decision, published on 6 November 1997, clearly complies

with these requests. Therefore, the complainant has received satisfaction and shows no cause of action with respect to the impugned decision.

10. As stated in Judgment 764 (*in re* Berte No. 2):

> "A decision by an international organisation is challengeable before the Tribunal only if it causes the complainant injury."

11. In the present case no injury to the complainant has resulted as the 23 May 1996 decision was revoked, so there is no substantive dispute between the complainant and the EPO concerning it.

12. The Appeals Committee's finding that the complainant's letter of 13 May 1998 constituted a new appeal against the new points system which entered into force on 1 January 1998 is wrong. The statement in the *Gazette* did not create a renewed possibility for appealing against the new points system beyond the times fixed by the applicable rules. The statement simply sought to identify appellants who disagreed with the Administration's statement that it considered that appeals 52/96 and 53/96 no longer showed any cause of action and it intended to close the files. The *Gazette* did not make any reference to a right of appeal against the new system. Furthermore, in her letter the complainant did not assert a new right of appeal. What she did was to attempt to make an additional claim or amend the position which she had taken in her original appeals by adding the words "without a time limit". If the complainant wanted to appeal against the new system she could and should have done so in the normal way.

13. Since her internal appeal to the President was irreceivable, her complaint to the Tribunal is likewise and must for the same reason be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

MICHEL GENTOT

JAMES K. HUGESSEN

HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

*Registry's translation,
the French text alone
being authoritative.*

# NINETIETH SESSION

***In re* Espinar Sierra** **Judgment No. 2025**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Miguel Angel Espinar Sierra against the Food and Agriculture Organization of the United Nations (FAO) on 24 December 1999 and corrected on 17 March 2000, the FAO's reply of 12 June, the complainant's rejoinder of 17 July and the Organization's surrejoinder of 25 September 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Spaniard who was born in 1943, was recruited by the FAO in 1979 on an appointment for two years as an expert in bioclimatology at grade P.4 for a project in Algeria. He was thereafter given several short-term contracts and worked on a project in Yemen among others. In October 1983 he was appointed to a grade P.4 post at the Office for Special Relief Operations (OSRO) at the Organization's headquarters in Rome under a contract that was extended several times. He was granted a continuing appointment as from 1 January 1991.

In 1993 the complainant was chosen on a temporary basis for a post as an agricultural economist at grade P.5 for a project in Tanzania. By a memorandum of 15 February 1994 he asked for "return rights" to OSRO at the end of that field assignment, and the FAO agreed. Originally applicable in March 1997, the "return rights" were brought forward to 31 January 1996 because his field project had been shortened. The complainant took up his new duties in Tanzania on 15 March 1994. His transfer involved a promotion to grade P.5 with effect from 1 April 1994. As from 18 January 1996 he was reassigned to FAO headquarters in Regional Service 3 (TCO3) of the Field Operations Division (TCO). On 1 February he was transferred to another post in TCO3. A notification of personnel action dated 7 March informed him that his grade had reverted to P.4 as from 1 February 1996. On 1 September 1996 he was transferred to Regional Service 1 (TCO1).

By a letter of 20 January 1997 the Director of the Personnel Division informed the complainant that restructuring and decentralisation proposals approved by the Director-General in 1994 involved transferring certain posts to the regional and sub-regional offices. The complainant's post had been identified for relocation to the Regional Office for the Near East in Cairo (Egypt). His official transfer was scheduled to take place before 30 June 1997. On 30 January 1997 the complainant filled up a "confirmation of reassignment" in which he stated that he did not speak Arabic, which was one of the languages required at the Regional Office for the Near East. He also pointed out that his youngest son had problems adapting to change and that a transfer would jeopardise his own career development prospects. Moreover, the transfer, if it took place, would be his third assignment in one year. Deeming himself unready for a transfer to Cairo, he therefore asked for a position in the Europe Unit of TCO1. In a letter of 24 February the Director of the Personnel Division confirmed his relocation to Cairo.

By a letter of 24 March 1997 the complainant informed the Director of TCO that he wished to be reinstated in his previous grade, P.5. The Director of TCO replied in a memorandum of 16 April that he would be transferred at his current grade, P.4. By a memorandum of 23 May the complainant appealed to the Director-General against "administrative decisions with a cumulative and humiliating effect", subjecting him to "downgrading, a series of transfers and a forced change of duty station". By a letter of

20 June the Assistant Director-General in charge of Administration and Finance informed him that his appeal was rejected. By a memorandum of 11 July the complainant went to the Appeals Committee alleging "prolonged administrative harassment". He nonetheless reported for duty in Cairo on 14 July 1997.

In its report of 8 July 1999 the Appeals Committee found the complainant's objection to the transfer to be his only receivable and sound plea. Noting a "language anomaly" in the job description for the post in Cairo, it recommended that the Director-General make a "special effort" to find him "an assignment suited to [his] linguistic and technical abilities" and which, if possible, would help to resolve his family difficulties. It also noted that the Organization's attitude had been "blatantly cavalier". In a letter of 24 September 1999, the impugned decision, the Director-General informed the complainant that he endorsed the Committee's recommendations and that the FAO was prepared to offer him a transfer to headquarters on a P.4 post as operations officer in the Field Operations Division. On 30 September 1999 the complainant wrote to the Director of the Personnel Division confirming his acceptance of the offer.

B. The complainant takes up the part of his appeal which the Organization deemed irreceivable, namely his plea of "prolonged administrative harassment", which consisted of downgrading him and transferring him several times though there was no obvious administrative need to do so. He contends that his appeal was receivable on all counts. The case law holds that an official may allege breach of an acquired right "due to an accretion of final decisions ... each of which, taken singly, would not itself have been deemed unlawful". Furthermore, the Tribunal allows exceptions to time limits where an organisation has misled an official or withheld some document from him in breach of good faith. The FAO hid its real intentions from the complainant and denied him his right to timely appeal. The Tribunal has found complaints to be receivable where the injury arises from the length of time over which the official suffered inconvenience. The complainant alleges in this connection that the FAO failed to cooperate with the Appeals Committee so as to "prolong" his family problems "as much as possible".

He submits that the Organization subjected him to "systematic and continuous harassment" and "discriminatory and humiliating treatment". It took several decisions which were contrary to its own interests as well as affecting him adversely, so it obviously intended to "harm his interests" and cause him unnecessary difficulties in his professional, personal and family life. Moreover, for every decision that affected him adversely the administration took a decision which benefited some other staff member. It was the Organization's indifference to the problems caused by his transfer to Cairo that made him realise that he had fallen foul of "persecution" and abuse of authority by the FAO. He adds that the FAO made "false statements" when it asserted that the post in Cairo required no knowledge of Arabic. And not until May 1997 did it inform him that his post was temporary: it thus hid from him "essential information" about his conditions of employment. Lastly, his downgrading and forced transfer created the presumption that he was being "punished for serious misconduct".

The complainant explains that, on upgrading him to P.5, the FAO failed to inform him that the promotion was temporary. It gave no reasons for his downgrading because, he says, it new full well that it was unlawful.

He alleges that the FAO kept him in a situation of permanent denial of his rights: it put him on an "unwritten black-list" in order to exclude him from the usual career development procedures. He cites several instances of competitions for which he applied but was turned down although he had all the necessary qualifications.

He asks the Tribunal to award him compensation for the "prolonged harassment" to which he was subjected, to quash the unlawful decisions which caused him moral and material injury – particularly the one downgrading him – and to order that his career be reconstituted on the basis of P.5, the level of post he held when he was downgraded, with payment of the corresponding salary including contributions to the United Nations Joint Staff Pension Fund. He also seeks an award of moral damages. He claims compensation equivalent to at least two years' gross remuneration for the deterioration in his family situation and professional reputation and for the decline in the health of his wife, who is having treatment for a depression triggered by the accumulation of events that prompted the complaint. Lastly, he seeks compensation equivalent to at least one year's gross pay for the injury caused by the infringements of the rules and selection procedures.

C. In its reply the FAO submits that the complainant's claim to compensation for harassment is irreceivable because he did not make it in the internal appeal. In subsidiary pleas it observes that the decisions to transfer the complainant were taken owing to requirements of service and in accordance with the rules. His early return from Tanzania had meant putting him on a temporary post at grade P.4 since no other assignment was possible. Another official having been picked for that post in August 1996, it had been necessary to reassign the complainant yet again. As for his transfer to Cairo, it was part of an "in-depth reform" of the Organization and his position had been considered with the attention it deserved. But in a structural reform involving a great many transfers, as was the case here, an organisation's scope for considering the individual interests of its staff is "limited". That was why the FAO had not regarded the objections raised by the complainant as an obstacle to his transfer. A knowledge of Arabic was not a requirement for the post in question. Besides, during his assignments to Algeria and Yemen, his lack of Arabic did not prevent him from performing his duties.

Likewise, his claim to the quashing of the decision downgrading him is irreceivable because he did not challenge it in an internal appeal. The FAO explains in subsidiary argument that to put the complainant back on a P.4 post was in keeping with the provisions of the Manual and "long-standing" FAO practice. His right of return was granted at the grade he held before his temporary assignment to Tanzania because it was impossible to guarantee him a P.5 post. So he knew full well before leaving for Tanzania that he would return to a P.4 post on completing his assignment in the field.

Lastly, the FAO observes that the case law on the reconstitution of careers is immaterial here. The complainant's transfer to Cairo and any family problems it may have caused do not warrant an award of moral damages. Field assignments are "an essential part of the career and status of any international civil servant" and the FAO has already helped to alleviate the complainant's problems by reassigning him to headquarters.

D. The complainant rejoins that his career has been ruined and that the FAO subjected him to unwarranted "vexatious treatment" in breach of its duty to respect the rights of every staff member at all times, particularly during major reforms. He further alleges that the Organization had no right to oblige him to accept temporary posts on returning from Tanzania, and points out that the latter were classified as grade P.5. He adds that the case law does recognise an official's right to count "experience acquired in the field".

In his submission, whether the duties of the Cairo post required a knowledge of Arabic is immaterial. What matters is that in order to commit an abuse of authority, the FAO submitted the wrong document.

Lastly, the Organization received in September 1997 the medical certificate attesting to his wife's illness but did nothing to alleviate his family problems until December 1999. Furthermore, it ignored the fact that one of his sons had problems in adapting.

E. In its surrejoinder the FAO presses its pleas. The decisions to transfer the complainant were taken because of the requirements of the service and were lawful. They betray no intent to injure the complainant or his family.

## CONSIDERATIONS

1. The FAO recruited the complainant in 1979. After several assignments in the field and at headquarters, including at the Office for Special Relief Operations (OSRO), it gave him a continuing appointment as from 1 January 1991. On 15 March 1994, at which time he held grade P.4, it transferred him on a temporary basis to a post for an agricultural economist at grade P.5 on a project in Tanzania. It had told him beforehand that his right of return to the same unit would be ensured. On returning from Tanzania earlier than expected because the project had been shortened, he was assigned in January 1996 to Regional Service 3 (TCO3), the service responsible for agricultural operations in Latin America and West Africa. From 1 September 1996 he was assigned to Regional Service 1 (TCO1) the service responsible for agricultural operations in Asia and the Pacific, Europe and the Near East. The FAO considered that on returning to

headquarters the complainant's grade should be the one he held before his temporary assignment to Tanzania, pursuant to the relevant paragraphs of the FAO Manual, and accordingly told him on 7 March 1996 that he had been put back on grade P.4. In January 1997 it informed him that because of restructuring within the Organization his post had been identified for relocation to the Regional Office for the Near East in Cairo. The complainant objected to the new transfer on the grounds, among others, that he did not speak Arabic and had family difficulties. However, after consulting the competent body the Director of the Personnel Division told the complainant in a letter of 24 February 1997 that although he sympathised with his personal circumstances he would still be transferred to Cairo. The Director of the Field Operations Division (TCO) confirmed on 19 March 1997 that he was to report to the Regional Office in Cairo in June. The complainant told him he wished to return to P.5 – the grade he had held when he was assigned to Tanzania and Yemen – and asked for his support. On 16 April 1997 he was told that he would be transferred to Cairo at his current grade, P.4.

2. The complainant made other attempts to escape transfer and on 23 May 1997 filed an appeal with the Director-General against "administrative decisions with a cumulative and humiliating effect" subjecting him to "a series of transfers and a forced change of duty station". Though he affirmed that he was not against transfer to a regional office as part of the decentralisation exercise and recognised the Director-General's authority "to assign a staff member to any tasks or any posts in the Organization", he sought the quashing of his transfer on the grounds that it was discriminatory, showed formal flaws and came after a series of decisions that had caused him serious moral and professional injury. He also sought reinstatement in grade P.5, which he had lost following the "decision of 7 March 1996 to downgrade him"; and reassignment to a post for which he was fully qualified. Lodged under Staff Rule 303.13, the appeal was rejected on 20 June 1997: the Assistant Director-General in charge of Administration and Finance deemed it out of time insofar as it challenged his transfers in 1996 and the decision to put him on grade P.4 on his return from Tanzania. He added that the latter decision was perfectly lawful, and

that the transfer to Cairo breached no rules and was in no way vexatious or discriminatory.

3. The complainant therefore took his case to the Appeals Committee on 11 July 1997. He sought the quashing of the "unlawful" decisions; reinstatement at P.5, the grade he held before the "decision to downgrade him" was taken on 7 March 1996; assignment to a post for which he was qualified; and compensation for the moral injury caused by the decisions he was challenging. He reported for duty in Cairo three days later, on 14 July 1997.

4. After a long enquiry, the Appeals Committee reported on 8 July 1999. It found that an examination of the circumstances of the complainant's downgrading and successive assignments showed no breach of the rules and procedures but indicated rather that the FAO "had dealt with matters in a blatantly cavalier manner". According to the Committee, although the successive decisions on his career did not betray "systematic and continuous harassment" and although his claim to their quashing is irreceivable because it was out of time, the part of his appeal relating to his objections to the transfer to Cairo is both receivable and sound, because the decision to transfer him was based on incomplete or wrong information. It therefore recommended "that a special effort be made, in observance of the rules in force, to find an assignment that meets the linguistic and technical abilities of the complainant and, if possible, helps to resolve his family difficulties".

5. By a letter of 24 September 1999 the Director-General notified the Committee's report to the complainant, indicating that he disagreed with the finding that the decision to transfer him to Cairo was based on incomplete or wrong information, but that a careful examination of the whole matter led him to endorse the Committee's recommendations. He therefore offered him an assignment to headquarters as an operations officer at grade P.4 in the Field Operations Division. The complainant agreed to the new transfer, which met his wishes, though he expressed reservations about the Committee's finding that part of his appeal was irreceivable. On 24 December 1999 he filed this complaint with the Tribunal seeking the quashing of the decision of 24 September 1999 insofar as it does not satisfy

his claims. He asks the Tribunal to set aside the unlawful decisions adversely affecting him and particularly the decision to downgrade him to P.4; to order that his career be reconstituted on the basis of grade P.5 and to award him compensation for the injury caused by the harassment to which he was subjected, and for the moral injury on all counts caused by the offending decisions.

6. The Tribunal must first determine which of the complainant's claims are receivable.

7. The Tribunal finds that his claim seeking the quashing of the decision of 7 March 1996 to put him on P.4, which the complainant sees as a downgrading, and the quashing of the decisions to reassign him, taken in 1996, is irreceivable because he failed to appeal within ninety days of the notification of those decisions, as Staff Rule 303.1311 requires.

8. However, his claim to the quashing of the decision to transfer him to Cairo is receivable. So too is his claim to compensation for the injury caused by the harassment he alleges and which is not specifically linked to the unlawfulness of any one of the decisions. His claim to compensation for the harmful effects of his transfer to Cairo is also receivable.

9. In support of his argument that the decision to transfer him to Cairo was unlawful, the complainant relies largely on the Appeals Committee's finding that the FAO paid scant heed to his family circumstances, his personal reservations and his lack of Arabic: although it was not tainted with abuse of authority, according to the Appeals Committee, the offending decision was nonetheless "based on incomplete or wrong information". The evidence shows that, contrary to what some of the information given to the Appeals Committee indicates, the post to which the complainant was assigned did not require any knowledge of Arabic. Furthermore, the complainant fails to establish any formal flaws, and mainly relies on the fact that the FAO took no account of his observations, which he sees as confirmation of the harassment he alleges. On that score the Organization is right in its assertion that the Director-General acted within his authority to assign staff and broke none of the rules.

10. Yet the FAO itself conceded that, after examining the whole matter carefully, it was bound to accept the Appeals Committee's recommendations; that was why it offered the complainant an assignment to headquarters. It thereby admitted – regardless of the fact, which it denies, that the Director-General's decision was based on incomplete or wrong information – that it had failed to assess the complainant's circumstances with the care required by administrative decisions that affect its staff. That in itself warrants the conclusion that, even though his assignment to Rome met the complainant's wishes in part, it did not fully make up for the injury caused by his transfer to Cairo in the circumstances described above. Consequently, in taking his decision of 24 September 1999 to assign the complainant to Rome, the Director-General was wrong not to award him the compensation he had claimed.

11. The complainant does not specify the nature and extent of the moral injury caused by that transfer, but a fair assessment of the circumstances of the case will be made by granting him compensation in an amount of 4,000 United States dollars.

12. The evidence shows that, in the course of his career, the complainant was unhappy about several decisions on assignments or grades which he did not contest at the time. However, there is no evidence of harassment or systematic wrongdoing on the part of the FAO. The complainant's claims to compensation for the injury he allegedly suffered on this count and to the reconstitution of his career must fail.

13. Since the complaint succeeds in part, the complainant is entitled to an award of 1,500 dollars in costs.

## DECISION

For the above reasons,

1. The Director-General's decision of 24 September 1999 is set aside insofar as it denies the complainant all redress.
2. The FAO shall pay the complainant the sum of 4,000 United States dollars in compensation.
3. It shall pay him 1,500 dollars in costs.
4. His other claims are dismissed.

In witness of this judgment, adopted on 9 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

# NINETIETH SESSION

***In re* Placci (No. 2)** **Judgment No. 2026**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs Marlene Placci against the International Telecommunication Union (ITU) on 3 December 1999 and corrected on 26 January 2000, the ITU's reply of 31 March, the complainant's rejoinder of 25 April and the fact that the Union has not exercised its right to enter a surrejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at the ITU was recounted under A in Judgment 1976 on her first complaint. In that case the Appeal Board recommended in its report of 22 March 1999 that a new job description should be drawn up for post 205 which she occupied as an administrative assistant at grade G.6 in External Affairs.

In April 1999 she was seconded to a newly created section called Corporate Communication to work on the ITU website. On 4 June she was given a new job description for post 205, which had been transferred with her. Annexed to it was an "ICSC* job description questionnaire". The same day her supervisor gave her a "work plan" listing the duties of her post.

On 20 June she wrote to the Secretary-General protesting that neither the job description nor the questionnaire reflected the tasks she was performing in her new post. She mentioned that she had also been given a work plan enumerating the tasks she was currently performing and asked whether the job description or the work plan took precedence: in her view neither document corresponded to a post at grade G.6 under the terms of the "Common General Service Job Classification Standard for Geneva". She requested that the tasks assigned to her, and the grade, be revised accordingly.

Having received no reply from the Secretary-General she filed an internal appeal on 20 August 1999 seeking a ruling as to whether it was the job description or the work plan which "prevailed". In her appeal she stated that the discrepancy and ambiguity had given rise to "mobbing" (professional harassment) and "bullying activities". She claimed compensation under several heads.

On 2 September she received a copy of a post classification report, No. 51/99, dated 20 August, in which it was recommended that her post be confirmed at grade G.6.

The Appeal Board issued its report on 21 December 1999, concluding that her appeal was irreceivable. It explained that, because of restructuring within the ITU, there had been delays in the Board taking up the complainant's case. Meanwhile, on 3 December 1999, the complainant had filed this complaint with the Tribunal challenging the implied rejection of her internal appeal.

B. The complainant submits that, since the job description, the ICSC job questionnaire and the work plan are at variance, it is not clear which of them determines her duties. In asking her to "simultaneously sign and agree to all three" the Union showed disregard for due process. She has four main pleas. First, she submits that she has been performing work at a level higher than grade G.6. without the corresponding remuneration. She considers that she is entitled to a retroactive pay increase or a special post allowance, otherwise the result would be unjust enrichment for the organisation. Secondly, she perceives the ITU's failure to resolve the conflict regarding her job description as a form of "psychological harassment", which was worsened by its giving her "conflicting and confusing work assignments". Thirdly, the organisation has failed in its duty to treat her with respect. It showed bias towards her and she has suffered moral injury. Fourthly, she objects to the conditions of her transfer to the Corporate Communication section because it took place with virtually no consultation or notice; she was not treated fairly or in good faith and was denied due process. As a result she has suffered loss of career prospects, salary and pension rights.

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* International Civil Service Commission

In addition she says that by following the recommendation of Post Classification Report No. 51/99, which confirmed her post at the G.6 level, the ITU misappraised the facts and committed a mistake of law.

The complainant seeks: the quashing of the decision "to maintain [her] job at the G.6 level as per Post Classification Report No. 51/99"; a "properly defined" job description and ICSC questionnaire that are in line with the "professional" work plan she was given; the reclassification of her post and "a new post classification report … relating to the tasks she is being asked to carry out with corresponding grade level"; a special post allowance for work which demands skills of a higher level than those expected from someone at grade G.6; and disciplinary measures – against the officials concerned – to stop "mobbing activities" against her. She seeks compensation: for "hindrance to her career development"; for "abuses sustained" through not having a relevant job description defining certain tasks that she has been performing at the Professional level; for the poor health which has resulted; and for loss of salary and pension rights. In view of the harassment suffered and the erroneous conclusions drawn by the ITU in not reclassifying her post she asks for: (a) the difference in pay between that of her G.6 post and that of a post at a higher level; and (b) damages of 1,471,357 United States dollars for moral injury.

C. In its reply the ITU contests the receivability of the complaint on the ground that it was filed prematurely. It points out that the procedure for requesting review of the classification of a post is laid down in Service Order No. 111 (Rev. 2) of 1 July 1981. The complainant did not adhere to the correct procedure for contesting either her job description or the classification of her post. Her request to the Secretary-General of 20 June 1999 was made before the classification procedure had run its full course. The post classification report of 20 August 1999 contained a recommendation to the Secretary-General with regard to the grade of her post. It was only subsequent to receiving that report that she could initiate a request for review. She did not, therefore, exhaust the internal remedies available to her.

D. In her rejoinder the complainant contends that her complaint is receivable. She submits that the ITU did not respect the rules governing appeals. Under the terms of Staff Rule 11.1.1 if the Appeal Board's procedure was expected to take longer than fourteen week the parties had to be notified of the delay. She received no such notification and was consequently free to file her complaint with the Tribunal.

The complainant indicates that the ITU produced another version of the work plan that she was asked to sign on 4 June 1999. According to the wording of that later version, dated 29 July 1999, she only "assists" with each of the tasks it listed, implying that she no longer has the same degree of responsibility for the duties she is performing. That constituted an attempt on the part of the organisation to downgrade the importance of her work. Moreover, asking her to sign the job description was an "astute way" of getting her to work at a higher level while keeping her on a G.6 salary.

The complainant questions whether Service Order No. 111 of 1981 is still in force, particularly as it has not been referred to in subsequent versions of the Staff Regulations and Rules. She says that the ITU failed to observe Rule 2.1 c) which calls for regular updating of procedures relating to classification plans.

From correspondence produced with the defendant's reply, she deduces that attempts were made by her supervisors to discredit her. She raises the issue of being awarded damages for libel, and costs, but leaves it to the Tribunal to decide on the matter.

## CONSIDERATIONS

1. This is the complainant's second complaint to the Tribunal, the first being the subject matter of Judgment 1976. In the context of her first complaint the Appeal Board recommended, on 22 March 1999, that the necessary steps be taken to establish a new job description for post 205 as soon as possible. A job description relating to the duties and responsibilities of the post occupied by the complainant was issued on 2 June 1999 together with an ICSC General Service job description questionnaire.

2. On 20 June 1999 she wrote to the Secretary-General referring to the job description and ICSC questionnaire and also to a work plan drawn up for her by her immediate supervisor. She said the job description and questionnaire did not reflect the tasks she was then being requested to carry out and asked which of those documents took precedence. She also said that neither the job description nor the work plan corresponded to a G.6 level post and requested that the tasks assigned and the grade be revised accordingly.

3. On 20 August 1999 a post classification report, No. 51/99, on post 205 was issued by the Personnel and Social Protection Department recommending that the post be confirmed at grade G.6 on the basis of the job description and the ICSC questionnaire that were given to the complainant on 4 June 1999.

4. On the same day, 20 August 1999, the complainant lodged an appeal with the Appeal Board in which post classification report No. 51/99 is cited as the "administrative decision". She requested the following relief: (a) the quashing of the decision to maintain the grade of her post at G.6 as recommended in post classification report No. 51/99; (b) a job description and job questionnaire in line with the "professional" work plan that had been given to her; (c) the reclassification of her post;

(d) disciplinary measures to stop "mobbing" (professional harassment) towards her; (e) compensation for hindrance towards her career and intellectual development, by virtue of "mobbing activities"; (f) compensation for the moral injury sustained as a result of not having a relevant job description reflecting professional tasks that she is requested to perform, such as writing brochures; (g) compensation for poor health caused by unfair treatment; and (h) compensation for loss of salary and pension rights.

5. The Appeal Board was unable to deal with the matter within the time specified in the Staff Rules and Regulations. Accordingly, the complainant lodged this complaint with the Tribunal on 3 December 1999 challenging the implied rejection of her appeal of 20 August 1999 under Article VII(3) of the Statute of the Tribunal. Her claims are listed under B above.

6. Classification procedures are provided for in Service Order No. 111 (Rev. 2) of 1 July 1981. Section 2 sets out the procedure for reviewing the classification of posts following changes in duties and responsibilities. The contents of a proposed new post description must be approved by the "head of organ" before it is submitted for classification; this person is responsible for settling any differences about the contents. The Personnel Department assesses the level of the post and recommends a grade; this is then notified to the Secretary-General, the "head of organ concerned" and the incumbent of the post.

7. According to Service Order No. 111 the Classification Review Board is "an advisory body responsible solely for dealing with classification questions and is not involved in, nor does it replace, the statutory appeal procedure". Point 3.3 of this order provides that staff members may request a review of the Personnel Department's recommendation on the grade of a post within six weeks from the time the staff member received notification of it in writing. The Board investigates the matter according to the procedures laid down and makes a recommendation to the Secretary-General. The Coordination Committee

then considers the recommendation and takes a decision on the matter. Finally, the Personnel Department notifies the official concerned.

8. When the complainant received the proposed post description together with the questionnaire, she did not apply to the "head of organ"; instead, she complained to the Secretary-General on 20 June, asking for a revision of the job description. She was in effect asking for the grade of her post to be revised before a recommendation had been issued. She initiated an internal appeal procedure on 20 August 1999 without exhausting the other internal remedies available to her.

9. Similarly, as to the relief claimed based on "mobbing" (professional harassment), she initiated the internal appeal without first obtaining an administrative decision against which she could appeal under Staff Rule 11.1.1.

10. The complaint, including all the claims for consequential relief, is irreceivable for failure to exhaust the internal remedies.

## DECISION

For the above reasons,

The complaint is dismissed.

**In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

**MICHEL GENTOT**

Mella Carroll

**MELLA CARROLL**

Flerida Ruth P. Romero

**FLERIDA ROMERO**

**CATHERINE COMTET**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

***Registry's translation,***
***the French text alone***
***being authoritative.***

# NINETIETH SESSION

***In re* Thiele** **Judgment No. 2027**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Christian Thiele against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 3 February 2000, the Agency's reply of 12 May, the complainant's rejoinder of 15 August and the Eurocontrol's surrejoinder of 23 October 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French national born in 1946, joined Eurocontrol in 1974. At the material time he was Head of the New Technologies Section at grade A5, in Management Information Services (MIS) of the Finance Directorate.

In a memorandum of 27 November 1997 to the Director of Finance, the complainant's direct supervisor – the Head of MIS – proposed creating two posts of "customer planning and coordination manager". He recommended a grade B2 staff member for one of them and the complainant for the other as a means "of minimising the impact of his performance limitations".

The Head of MIS having described his behaviour as "irresponsible" in a memorandum of 26 November 1997, the complainant asked the Director General to take a stance on the dispute between them. The Director General replied on 7 January 1998 that it was a matter of intra-departmental relations and referred it to the Director of Finance. By a memorandum of 10 June 1998 the complainant again objected to his supervisor's treatment of him, accusing him of attempting to void his post as Head of Section of all substance. The Director of Finance replied on 11 June that he declined to take a stance on the accusations but inferred from them that the complainant's relations with his immediate supervisor had deteriorated to the point where it had become necessary to find him a post elsewhere than in MIS. By memoranda of 9 and 10 July, the complainant informed the Director of Human Resources and the Director of Finance that he had "never asked to leave [his] job in the Finance Directorate".

At the Director General's request the complainant sent him proposals for a new assignment in a letter of 20 October 1998. He said that he had no objection to a transfer provided that it was not against his interests. After several exchanges of views with his supervisors he was offered a reassignment to the post of "Customer Relationship Manager for Logistics and External Services" in MIS. He refused the offer by a memorandum of 26 January 1999; however, on 17 February 1999 the Director of Finance confirmed the transfer. By a memorandum of 23 April the complainant informed the Director of Finance that he would "execute the orders faithfully" but would appeal against the decision.

On 17 May 1999 the complainant filed an internal complaint with the Director General against that decision. After hearing him, the Joint Committee for Disputes unanimously concluded on 7 October that the complaint should be rejected as irreceivable because the decision did not affect him adversely. However, "speaking from a social rather than a legal standpoint", the Committee recommended "envisaging a transfer out of MIS very shortly". By a letter of 2 November 1999 the Director of Human Resources informed the complainant on the Director General's behalf that his internal complaint had been rejected and that the matter of his reassignment was being considered. That is the impugned decision.

By a decision of 24 January 2000 the complainant was transferred as from 1 February to the post of "Projects and Services Coordinator" in the Central Route Charges Office. This post is not in the Finance Directorate. By a memorandum of 31 January he accepted that decision, albeit with a number of reservations.

B. The complainant submits that the dispute was prompted by the decision of 17 February 1999 to transfer him which affected him adversely because it implied a change of duties and assigned him to a post which did not match his grade. Consequently, it was not properly substantiated, as the case law requires. In his submission, the Agency should first have conducted an inquiry, since he and his immediate supervisor were at odds. He criticises the Director General and the Director of Finance for refusing to take a stance. He alleges abuse of process in that he was subjected to measures resembling disciplinary sanctions without the safeguards of due process.

He asserts that the post of Customer Relationship Manager for Logistics and External Service is a grade B one: the incumbent simply serves as a "relay" and needs no university qualifications. In fact, a staff member in a post similar to his holds grade B2. The only difference between the two is in the number of tasks not their nature, the complainant having more "customer services". This is an affront to his professional dignity. Moreover, the Agency failed in its "duties of assistance, care and sound administration" which required removing him from the authority of his supervisor. If the reason for the decision in question was poor performance, which he denies, then there was obvious misappraisal of the facts. He accuses the Head of MIS of abuse of authority and the Director of Finance and the Director General of failing in their duty of vigilance.

He asks the Tribunal to quash the decision of 17 February 1999 to transfer him and the decision of 2 November 1999 rejecting his internal complaint; to order the Agency to pay him compensation in an amount of 1 million Belgian francs plus interest at the rate of 8 per cent a year as from 17 May 1999, the date of his internal complaint; and to award him costs.

C. In its reply Eurocontrol submits that the decision of 17 February 1999 was a decision to reassign – not transfer – him, taken in the context of the general reorganisation of the service. It denies that the poor relations between the complainant and his immediate supervisor were the cause of the decision. The complaint is therefore irreceivable because it does not challenge a decision which was taken by the appointing authority and which affects him adversely. There has been no change in the nature, grade or remuneration of his employment. Furthermore, the complainant has no cause of action, since he has not challenged his subsequent transfer to another service.

In subsidiary argument the Agency rebuts the complainant's pleas. It maintains that the "measure" taken on 17 February 1999 cannot be dubbed a "decision adversely affecting" a staff member which needs to be substantiated. Besides, the complainant was amply informed of the reasons for the reassignment. Secondly, it was not a disciplinary sanction: an inquiry was therefore not necessary and there was no abuse of process.

Eurocontrol contends that the complainant's duties did match his grade. The comparison with a colleague holding a similar post is irrelevant: the nature of the duties may be the same, but there are far fewer of them. The complainant may not plead an affront to his dignity as he failed to avail himself of the special procedure for such grievances. The Agency asserts that it showed understanding towards the complainant but that he himself refused to be transferred out of the Directorate of Finance. It reiterates that his reassignment was not the consequence of his differences with the Head of MIS. It denies that there was an obvious misappraisal of the facts or abuse of authority. It asks the Tribunal to award all costs against the complainant.

D. The complainant rejoins that the decision in question is a decision to transfer him and has affected him adversely, and that he still has a cause of action because his reassignment outside the Directorate of Finance is temporary and there is no knowing what his administrative status will be when it ends. He adds that his complaint addresses "more generally ... the way his supervisor treated him", and is therefore receivable.

He maintains that the decision was inadequately reasoned and the reasons that the Agency gave in its reply were not the real ones. He points out that the Joint Committee on Appraisals, which heard an internal complaint he filed against an appraisal report written on 10 September 1999 by his immediate supervisor, recommended quashing the report in its entirety because it was unfair. According to the complainant when the Director General endorsed that recommendation on 12 July 2000, he confirmed that the Head of MIS was biased. The complainant submits that he was downgraded in a covert manner.

He presses his plea that the post of Customer Relationship Manager did not match his grade. He points out that the Agency concedes that the nature of his duties were the same as those pertaining to a post held by a grade B2 official. Eurocontrol's assertion that it was up to him to challenge the affront to his dignity is surprising: it was the Director General himself who asked him not to pursue the matter. The complainant quotes from the opinion of the Joint Committee on Appraisals in which the latter regrets that the Director of Finance took "no initiative to stop the deterioration in relations" with the Head of MIS. That, he says, is proof that the Agency failed in its duty towards him. He denies refusing a transfer away from the Directorate of Finance: he simply made the point that he had not asked for such a transfer and felt it to be unfair.

E. In its surrejoinder Eurocontrol maintains that the complaint is irreceivable: he has not challenged a decision by the Director General but an organisational measure decided within the department. The complainant fails to show a cause of action since the quashing of the impugned decision could not have the effect of returning him to his former duties, as they no longer exist. His claim to compensation for the injury he allegedly suffered at the hands of his supervisor is irreceivable because he failed to exhaust all internal remedies.

In Eurocontrol's submission, the complainant's contention that he did not know the reasons for the measure taken on 17 February 1999 shows bad faith. The facts subsequent to this measure are immaterial and must be discounted. However, although as a mark of goodwill the Agency quashed his appraisal report pursuant to the recommendation of the Joint Committee on Appraisals, that has no effect on the lawfulness of the transfer. It points out that heads of department have a broad measure of independence in organising their departments. Lastly, nothing prevented the complainant from resuming the proceedings to protect his dignity when he realised that its proposals were unsuitable.

Eurocontrol adds that an audit of functions being carried out at the Agency should result in the other post of Customer Relationship Manager being put up to grade A.

## CONSIDERATIONS

1. The complainant joined Eurocontrol in 1974. At the material time he was Head of the New Technologies Section at grade A5 in Management Information Services (MIS) of the Finance Directorate.

2. The Director of Finance noted in a memorandum of 11 June 1998 that a new post should be sought for the complainant outside MIS, because relations between the complainant and the Head of MIS, his immediate supervisor, had begun to deteriorate following two incidents.

On 8 October 1998 the Director General asked the complainant to submit proposals for a new assignment.

Finally, after several exchanges of views, the complainant was offered a reassignment as part of the general reorganisation of MIS, as Customer Relationship Manager for Logistics and External Services. The complainant refused the offer but the Director of Finance sent him a memorandum on 17 February 1999 confirming his appointment to that post as from 1 March 1999.

3. The complainant lodged an internal complaint against that decision on 17 May 1999. In its opinion of 7 October the Joint Committee for Disputes recommended rejecting the complaint as irreceivable because the decision in question did not affect the complainant adversely, and also as devoid of merit, none of his pleas being sound. However, "from a social rather than a legal standpoint" the Committee suggested that the Director General transfer the complainant out of MIS as soon as possible. By a decision of 2 November 1999 the Director of Human Resources informed the complainant on the Director General's behalf that his internal complaint was rejected. He also told him that his transfer, recommended by the

Committee, was being considered carefully and that he would be consulted as to any further action taken.

That is the decision now impugned.

4. Eurocontrol contends that the complaint is irreceivable because the "decision" to transfer him was not a real decision coming from an appointing authority, thus, he fails to show injury and has no cause of action.

The objections to receivability fail. Even a simple measure on a matter of internal reorganisation such as transfer may sometimes impair the staff member's rights and legitimate interests (see Judgment 1078, *in re* Schaack, among others). Furthermore, the impugned decision has taken effect.

5. The complainant has a number of pleas which he describes as formal and procedural: the Agency failed to state its reasons in breach of Article 25(2) of the Staff Regulations governing officials of the Eurocontrol Agency; it failed to carry out an objective and impartial inquiry prior to the decision to transfer him, and there was abuse of process in breach of Articles 51 and 88 to 90 of the Staff Regulations. The Tribunal will consider these pleas together with the substantive pleas since, in order to rule on them, it needs to ascertain the nature of the decision in question and whether it was indeed a hidden sanction imposed for disciplinary reasons or on grounds of inadequate performance, in the form of a transfer to a post in a lower category, which amounts to downgrading.

6. The evidence shows that the complainant was to be found a new post because relations with his first-level supervisor had become increasingly strained since 1997. However, when he was offered the post of Customer Relationship Manager for Logistics and External Services, he said that he did not want it because it comprised no supervisory duties and did not match his grade. The Director of Finance nonetheless confirmed the new assignment in a memorandum of 17 February 1999. The complainant construed that decision as proof that the Agency shared his immediate supervisor's views about his abilities and had imposed a hidden sanction on him for which there was only one explanation: malice on the part of the Head of MIS.

7. The argument is unsound. Since the complainant offers no objective evidence to bear out his allegations, the Tribunal sees no reason to disbelieve the Agency's assertion that it transferred the complainant as a result of a general reorganisation of MIS which involved almost all staff in the department.

Consequently, the pleas – that the Agency failed to substantiate its decision and conduct an inquiry, committed a breach of procedure, drew obviously wrong conclusions from the evidence and abused its authority – cannot succeed. The complainant has failed to provide objective evidence that the impugned decision is a transfer which should be treated as a hidden sanction, imposed because he did not get on with his supervisor and the latter had given him an adverse performance appraisal.

8. Having ascertained that the decision is not a hidden sanction, the Tribunal must also determine whether it respects the complainant's dignity and good name and does not cause him unnecessary hardship.

9. The complainant takes the view that the duties of the post in question did not match his grade in breach of the first paragraph of Article 7 of the Staff Regulations, and that his professional reputation was damaged. That paragraph says:

> "The Director General shall, acting solely in the interests of the service, assign each official by appointment or transfer to a post in his category or service which corresponds to his grade."

The second paragraph of Article 5(1) states:

> "Category A shall comprise eight grades, involving administrative and advisory duties which require university education or equivalent professional experience ..."

10. The complainant contends that the post he was assigned to is a grade B one, the incumbent serving simply as a "relay" or "letter box", which obviously does not require a university education. In support of that assertion he argues that another post of Customer Relationship Manager with duties defined in a manner similar to his own was given to a grade B2 staff member, whereas he holds grade A5; and the only difference between the two posts is the number of "customer services" for which he provides liaison with MIS.

11. The Agency contends that, according to the job description, the duties of the post of Customer Relationship Manager do meet the criteria set in the second paragraph of Article 5(1) of the Staff Regulations, since the functions include planning, negotiation, coordination and an analysis of customer needs.

Moreover, the fact that these functions may be different from his duties in MIS does not mean that they are inferior, as the post involves responsibility and requires extensive knowledge of information technology and, above all, communication and negotiating skills.

As to the grade B official in a post similar to his, whom he cites for the purposes of comparison, the Agency does not deny that the nature of his duties are similar to the complainant's, but asserts that they are far less extensive as he is responsible for far fewer "customer services". Consequently, says the Agency, the difference in grade between the two is warranted by the differences in their tasks and is not at odds with the criteria set in Article 5(1).

12. The defendant's arguments are unsound. A quantitative difference in duties rather than a difference in their nature or intrinsic importance is not a decisive criterion on which to base a difference in grade between two officials who perform exactly the same duties.

The Agency's explanation in its surrejoinder that an audit of functions being carried out at Eurocontrol should result in the grade B official's post being put up to grade A merely bears out the complainant's assertion that at the time of his reassignment the duties of Customer Relationship Manager did not correspond to grade A because they conferred no power of decision and relegated the incumbent to information and documentation duties, which require no university qualifications.

13. The complainant is therefore right in his assertion that the grade did not match the job in breach of the first paragraph of Article 7 of the Staff Regulations. The impugned decision, based on an unlawful measure must therefore be set aside.

14. The Tribunal holds that even though the Agency subsequently followed the recommendation of the Joint Committee for Disputes and offered the complainant another assignment which he accepted – this unlawful measure did cause him moral injury by impairing his professional dignity, and he is entitled to redress.

15. The complainant claims one million Belgian francs plus interest at the rate of 8 per cent a year as from 17 May 1999 in compensation for the injury caused by the decision of 17 February 1999 and the conduct of the Head of MIS. In view of the circumstances of the case, the Tribunal considers that an award of 2,000 euros is fair redress but only for the unlawfulness of the decision of 17 February 1999. The complainant having failed to show injury stemming from the conduct of the Head of MIS, his claim on that count must fail.

16. The complainant is entitled to an award of 2,000 euros in costs.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Agency shall pay the complainant the sum of 2,000 euros to include all interest at the date of the delivery of the judgment.
3. It shall pay him 2,000 euros in costs.
4. All other claims are dismissed.

**In witness of this judgment, adopted on 9 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

***(Signed)***

**MICHEL GENTOT** **JEAN-FRANÇOIS EGLI** **SEYDOU BA**

**CATHERINE COMTET**

# NINETIETH SESSION

***In re* Stenberg** **Judgment No. 2028**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the complaint filed by Miss Susanne Stenberg against the European Patent Organisation (EPO) on 3 February 2000 and corrected on 24 February, the EPO's reply of 12 May, the complainant's rejoinder of 21 June, and the Organisation's surrejoinder of 30 August 2000;**

**Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which neither party has applied for;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, a Swedish national born in 1967, joined the staff of the European Patent Office, the EPO's secretariat, on 2 November 1998. She was appointed for a twelve-month probation period and assigned to Directorate-General 1 (DG1) in The Hague. From 2 November to 23 December she participated in a training programme for new search examiners at the Office's Academy. Participants in the programme were assigned tutors.**

In a meeting with the complainant on 23 December 1998, the Director of Training at the Academy informed her that she was not suitable as a search examiner and gave her a copy of a probation report which stated that she was "obviously inadequate". He informed her that he was recommending that she be dismissed in accordance with Article 13(2) of the Service Regulations for Permanent Employees of the European Patent Office and that she had until 8 January 1999 to comment on the report. He also told her that she could resign in lieu of being dismissed.

On 8 January the complainant submitted her comments to the Director of the Personnel Department and asked to be retained for an additional four months to prove her capabilities. On the same day she met that Director who also told her that she would be allowed to resign rather than be dismissed. On 11 January he informed her of the financial implications of dismissal versus resignation.

On 13 January a "reconsideration" meeting was held between the Principal Director of Administration, the Director of Training, the complainant's Director in DG1, the Academy instructors and other officials of the Administration. Neither the complainant nor her tutor attended the meeting, and no staff representative was present. In a meeting the following day the Principal Director of Administration informed her that the outcome of the meeting was that the Office could not afford the amount of extra training she would need to perform her duties. She was given until 15 January to resign; she opted not to do so and on 15 January she was given a letter, signed by the Director of Personnel, dismissing her with immediate effect. On 12 February 1999 she appealed against that decision.

In its report of 7 July 1999 the Appeals Committee found that the complainant was given insufficient warning and recommended that the decision to dismiss her be rescinded. By a letter of 14 September the Director of Personnel informed the complainant that the Office would consider the possibility of a "financial arrangement covering the cause of [her] appeal". However, she let him know via a staff representative that she preferred to wait for the President's final decision. On 8 November 1999 the Director of Personnel informed her that the President had rejected her appeal. That is the impugned decision.

B. The complainant contends that the decision to dismiss her was tainted with five procedural and two substantive flaws.

First, according to Article 13(2) of the Service Regulations, a decision to dismiss a probationer before the end of the probationary period must be based on a report on the probationer's ability to carry out the work assigned. She argues that, under the general principles applicable to the international civil service, there exist certain rules governing reporting which require a report to be drawn up by an immediate superior, to be on an official form, and to be given to a countersigning officer. None of these conditions was fulfilled in her case. Furthermore, the report should have been written by her Director in DG1 and not the Director of Training.

Secondly, she claims that her comments on the report were not taken into consideration; even before submitting them she was told that the decision to dismiss her had already been taken.

Thirdly, she submits that the decision was not taken by the proper authority. The dismissal letter of 15 January 1999 was signed by the Director of Personnel and makes reference to the Principal Director of Administration. However, Article 13 states that it is the President of the Office who has the authority to dismiss a probationer.

Fourthly, she claims that a decision to dismiss an employee must be preceded by a formal warning, as established by the Tribunal's case law and the jurisprudence of international civil service law. Yet even the Appeals Committee found that "she was not informed clearly enough or in good time". Consequently, she has been deprived of the opportunity to show an improvement in her performance.

Fifthly, she argues that the decision was not duly reasoned as required by Article 106(1) of the Service Regulations. The reason given in the dismissal letter was too general to allow her to rebut it properly.

As for the two substantive flaws, the complainant contends first, that it was not proven that she was "obviously" inadequate. She was dismissed after only seven and a half weeks at the Academy. This period was not sufficient to evaluate her work or her suitability as an examiner. The probation report was written by the Director of Training, who had no direct knowledge of her work and who based his assessment on input from her instructors at the Academy but not from her tutor; it was her tutor and not the instructors who worked directly with her. Furthermore, the Appeals Committee found that the report was "based on an assessment of her learning ability as a student in the Academy"; she contends that this is not the same as an assessment of her working ability. Secondly, she argues that the decision to dismiss her was flawed by abuse of power. She submits that the real reason for her dismissal was a lack of tutors.

She requests the Tribunal to: (1) quash the impugned decision, thereby quashing the initial dismissal decision; (2) order the EPO to pay her the remuneration and benefits she would have received if she had been allowed to complete the entire twelve-month probation period, plus interest from 15 January 1999; (3) order that she be paid compensation for material injury; (4) award her 10,000 Dutch guilders in moral damages; and (5) award costs.

C. In its reply the Organisation submits that the decision to dismiss the complainant during her probationary period was not flawed and that it was consistent with the Tribunal's case law. The Tribunal has held that a probationer may be dismissed before the end of the probationary period if the head of the organisation is satisfied that the probationer does not have the right qualifications, and decisions made under this condition are open to only limited judicial review. It has also held that a "formal warning" is not required in instances where it can be shown that it would serve no purpose. Furthermore, the complainant should have realised that there was some concern about her ability as an examiner from conversations she had had with her instructors and other colleagues.

The EPO contests that the decision was procedurally flawed. The Director of Training is indeed the competent authority for writing a probation report on someone still undergoing training at the Academy. It would have made no sense for her future Director to draft such a report since she had not yet had any contact with him. Furthermore, Article 13(2) of the Service Regulations does not specify that the report must be drawn up on a particular form. It denies that her comments were not taken into consideration and points out that the individuals involved with her probation met on 13 January 1999 to reconsider her case. The fact that the President did not sign her dismissal letter was not a procedural error. It submits that under the "delegation of powers" in force at the Office, a senior officer in the Personnel Department is competent to take such decisions even where the Service Regulations indicate that they should be taken by the President of the Office. Finally, the EPO asserts that the decision was duly reasoned: she received a copy of the report written by the Director of Training and was given an opportunity to comment on it.

It denies that there were any substantive errors in the decision. The complainant has failed to prove that she was not "obviously inadequate" and her plea of abuse of power, based on pure speculation, is unfounded.

The EPO submits that no material injury stemmed from the Organisation's actions because she managed to find employment despite her dismissal from the EPO.

D. In her rejoinder the complainant submits that the Organisation has misinterpreted the Tribunal's case law in arguing that a formal warning is not required. The case law cited by the EPO relates to "faults of manner" and not job qualifications and she points out that the Appeals Committee found that this was not applicable to her. Furthermore, the extra attention she received during the training programme does not qualify as a warning.

She presses her plea that the Director of Training was not the competent supervisor to draft her probation report and she attaches to her submissions an e-mail that he sent to the EPO's legal department describing his role as Director. In that e-mail he said that his role was to check and sign all search reports; she notes that he did not say that he drafted and signed probation reports.

The complainant adds to her plea regarding the use of an official form for probation reports. Using the same form for all staff members and requiring a countersigning official safeguards staff members from arbitrariness.

She contends that she did suffer material injury. She had to bear the costs of travel and relocation to The Hague. Although she has already found new employment, her current salary is substantially lower than the salary she was paid at the EPO.

E. In its surrejoinder the EPO maintains that it has properly interpreted the Tribunal's case law regarding termination of probationary appointments and the duty to warn. It is the Organisation's view that the complainant's situation represented one of the exceptional cases where a warning would serve no purpose.

It presses its pleas that there were no procedural flaws in the drafting of her probation report. As the supervisor of the Academy staff and the training programme, the Director of Training was the appropriate person to draft that report. There is also no requirement that such a report must be written on a particular form. Although there are guidelines on reporting at the EPO, those apply only to staff members whose appointments are confirmed after completing the probationary period.

## CONSIDERATIONS

1. The complainant joined the European Patent Office as a search examiner at grade A2 as a probationer. She commenced her probation on 2 November 1998 at the Office's Academy. On 23 December 1998, at the end of her Academy training, the Director of Training signed a report on her performance during the course. He said that she had not shown the aptitude to become a successful examiner. He listed her deficiencies and said she had stayed "far below the average learning progression of her group". He concluded that her results were far below those expected of examiners on probation, and this would not allow her to proceed with the training programme; she lacked the ability to make efficient use of the Office's search tools and she was not able to put into practice sufficiently the training given at the Academy; she seemed not to understand the methods of performing an exhaustive search; her deficiencies were fundamental and there was "no hope of substantial improvement"; she was

obviously not suited to performing the work of an examiner and he recommended her dismissal at the earliest possible date in accordance with Article 13(2) of the Service Regulations.

2. This report was given to the complainant and she was asked to respond by 8 January 1999. On that date she provided her comments.

3. On 13 January the Principal Director of Administration held a meeting with other officials of the Administration, the complainant's Director in DG1, the Director of Training and Academy instructors to discuss the complainant's situation. They had all been given a copy of her comments on the report. The conclusion reached at the meeting was that her work was clearly so unsatisfactory that there could be no justification for a longer probationary period and her comments on the report gave no reason to change that position. The Principal Director of Administration informed the complainant on 14 January 1999 of the negative outcome of the meeting. She was given the option of resigning or being dismissed. She opted not to resign and on 15 January received a letter of dismissal signed by the Director of Personnel.

4. She lodged an appeal on 12 February 1999. In its opinion of 7 July 1999 the Appeals Committee recommended that the decision be set aside on the procedural ground of insufficient warning. By a final decision dated 8 November 1999 the complainant was informed that the President of the Office decided to reject her appeal considering in particular that, in view of her performance at the Academy, there was no chance that the probationary period would be a success. The letter was signed by the Director of Personnel. This is the impugned decision.

5. In her complaint the complainant seeks the quashing of the impugned decision and the initial dismissal decision. She does not seek reinstatement but does seek compensation. The complainant argues that the decision was procedurally flawed on five grounds: (1) the report of 23 December 1998 was not drafted by her hierarchical superior; it was not

on an official form and was not signed by a countersigning officer; (2) her comments on the report were not taken into consideration because the decision to dismiss her was already made; (3) the decision of 15 January 1999 to dismiss her was not taken by the proper authority, i.e. the President of the Office; (4) she received no written or oral warning; and (5) the decision was not reasoned.

6. She also listed two substantive flaws: (1) the Organisation did not prove that her ability was inadequate – seven and a half weeks was too short a period to reach that conclusion; (2) there was abuse of power in that the real reason was that there were not enough tutors.

7. Article 13 of the Service Regulations deals with the probationary period, which, at the material time, was twelve months for employees in the complainant's category. Article 13(2) provides for probationary reports not less than one month before the expiry of each six-month period. The report should assess the ability of the probationer to perform the duties assigned and his or her efficiency and conduct in the service. Article 13(2) also provides:

> "A report on the probationer may be made at any time during the probationary period if his work is proving obviously inadequate. The report shall be communicated to the probationer, who shall have the right to submit his comments in writing. On the basis of the report the President of the Office may decide to dismiss the probationer before the end of the probationary period."

8. Regarding the complainant's pleas on procedural grounds the Tribunal holds:

(1) On completion of her training in the Academy, the proper person to draw up the report was the one in charge of training and not her hierarchical superior in DG1 where she had not yet commenced work. The official form to be used for each six-month period and to be signed by a countersigning officer would not have been appropriate for a report on ability shown whilst at the Academy. There is no specific procedure for the drawing up and signing of such a report. This ground fails.

(2) A comprehensive meeting was held on 13 January 1999 and many people concerned in her training were present. All of them had been given a copy of her comments. It was after that meeting that the complainant was informed of the negative outcome and given an option to resign or be dismissed. It is therefore not substantiated that a decision was made without taking her comments into consideration.

(3) While the Service Regulations provide that the President of the Office may decide to dismiss a probationer before the end of probation, the letter of dismissal was written and signed by the Director of Personnel. On the face of it there is no indication that he was doing it on behalf of the President. He also signed the letter of 8 November 1999 containing the impugned decision. In this letter he informs the complainant of the President's decision to reject her appeal. The Tribunal does not dispute the principle of delegation of authority (see Judgment 1386 *in re* Bréban); however, when a complainant calls for proof that power has in fact been delegated to a specific person, it is a matter for the Organisation to produce such proof. The Organisation has failed to do so claiming that "it goes without saying that senior officers at the helm of the Personnel Department are entitled to decide in cases where the Service Regulations provide that the President should decide". This is not an adequate reply to the procedural ground. In the absence of any proof the argument succeeds.

(4) The Organisation did not claim that the complainant received a written or oral warning that there was a risk of dismissal at the end of the period at the Academy. It cites Judgment 1817 (*in re* Jassogne) which says that a "warning will serve no purpose at all if the probationer is obviously unwilling or even unable to heed it". In such circumstances, a warning does not have to be given. The Appeals Committee requested separate reports from the officials concerned with her training at the Academy. The complainant's tutor said that, although she did not receive a written warning that she might be dismissed, the extra effort and attention required by the instructors and himself, and the fact that she lagged behind compared to her colleagues, could, in his opinion, have caused her some concern and discomfort about her position as a probationer. He did not know, however, if she actually sensed any of this at that time. One of her instructors said that on 13 November 1998 he took her aside for a serious

talk and told her that her performance was not what could have been expected and proposed that she did additional work by coming in earlier or leaving late. However, he did not notice her doing either. Another instructor said that after discussions with two of his colleagues, the three of them had offered the complainant an opportunity to do extra work with them if she so wished, but she did not feel it was necessary. In the Tribunal's view the complainant must have been aware of her poor performance in comparison with her fellow trainees. It was certainly pointed out to her. If she was not aware of the situation, it underlines her basic inability and lack of understanding of what was required of her. The observations on her inadequacies can be considered as equivalent to an oral warning. If she had received a written warning of possible dismissal there is no reason to believe that she could have improved her basic ability or comprehension in any way. The lack of a written warning should not be considered a formal defect in this case.

(5) The plea that the decision to dismiss her was not reasoned does not succeed. The decision must be viewed in the light of what was already known to the complainant. The letter of dismissal referred to the report by the Director of Training and the conclusion that she did not have the ability to work as an examiner. The report summarises her deficiencies which the Director says are "fundamental and there is no hope for substantial improvement". The report of the Director must be regarded as supplying detail in relation to the stated reason that she was dismissed because she did not possess the ability to perform adequately as an examiner.

9. As regards the first substantive ground, the allegation that the Organisation has not proved the complainant's ability to be inadequate and that seven and a half weeks was too short to judge, it is clear to the Tribunal that the collective opinion of those involved in training at the Academy was that from the beginning she lagged behind and that at the end her ability and competence were inadequate for the duties as an examiner. The aim of a probationary period is to see if the probationer can become a useful member of staff. The assessment of her abilities does not show any flaw which would justify setting aside the decision on that ground.

10. A second substantive ground alleging abuse of power is based on her contention that the real reason for her dismissal was that there were not enough tutors. This is highly speculative and there is no foundation for it.

11. The net result is that the complainant succeeds on only one ground, that is the failure of the Organisation to prove delegation of power by the President. This does not make it a case in which it would be appropriate to set aside the decision to dismiss. The complainant's performance was clearly unsatisfactory in the judgment of experienced trainers. Therefore, in accordance with Article VIII of the Tribunal's Statute, she is entitled to a sum for moral damages which the Tribunal sets at two months of the basic salary she was receiving at the time of her dismissal (not including any allowances). She is also entitled to costs in an amount of 2,000 euros.

## DECISION

For the above reasons,

1. The Organisation shall pay the complainant a sum calculated in accordance with consideration 11.
2. It shall pay her 2,000 euros in costs.
3. The other claims are dismissed.

**In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

Flerida Ruth P. Romero

FLERIDA ROMERO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

**Organisation internationale du Travail** **International Labour Organization**
*Tribunal administratif* *Administrative Tribunal*

***Registry's translation,***
***the French text alone***
***being authoritative.***

# NINETIETH SESSION

***In re* Coates (Nos. 1 and 2)**
**(Application by the FAO for review)**

**Judgment No. 2029**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the application filed by the Food and Agriculture Organization of the United Nations (FAO) on 6 October 1999 for review of Judgment 1871, Mr David Coates' reply of 15 February 2000, the FAO's rejoinder of 27 April and Mr Coates' surrejoinder of 5 June 2000;**

**Considering Article II, paragraph 5, of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which neither party has applied for;**

## CONSIDERATIONS

**1. In Judgment 1871 delivered on 8 July 1999, the Tribunal ordered the FAO to pay Mr Coates 100,000 United States dollars in compensation for the injury he suffered by its rejection of his application for a post as Fishery Resources Officer in the Fisheries Department at the Organization's headquarters. Expressing serious concern at a judgment which it finds inconsistent with the constitutional provisions of the FAO that govern the Director-General's prerogatives in the administration of the Organization, the FAO is asking the Tribunal to review its judgment. While aware that the case law is very restrictive as to the admissible grounds for review, it considers that the circumstances of the case afford reasons for hoping that the case law may be applied more flexibly here.**

2. Consistent precedent holds, and the FAO does not deny, that the Tribunal's judgments carry the authority of *res judicata* from the date on which they are delivered and may be reviewed only in quite exceptional circumstances: if there is a material error, or failure to rule on a claim, or if new facts emerge subsequent to the original proceedings or if particular facts which might have influenced the decision are overlooked. But an alleged mistake in appraisal of the facts does not constitute grounds for review, nor does an allegation of a mistake in law.

3. The Organization takes the view that the Tribunal should be more flexible in applying the case law, which, it says, does not take into account recent developments in the legal systems of many countries which provide for two levels of jurisdiction or for appeal against court judgments. That argument in effect contests the Tribunal's Statute, which says that the Tribunal's judgments are "final and without appeal". Furthermore, the lengthy reference to the means of appeal available under French administrative law overlooks the fact that the Council of State (*Conseil d'Etat*) rules directly as court of first and last instance on complaints concerning the position of public officials appointed by a decree of the Council of Ministers, and its decisions are not subject to appeal in any higher court.

4. The Tribunal will nonetheless consider whether the Organization's pleas fall within the admissible grounds for review. The FAO submits that in interpreting the rules on the recruitment of professional staff the Tribunal made an error of law which voids Article VIII(3) of the FAO Constitution of all substance and disregards the Director-General's discretionary authority. Such an allegation calls into question the Tribunal's legal reasoning. To allow review of the interpretation of those rules would render meaningless the principle that the Tribunal's judgments are final and immediately acquire the authority of *res judicata*. It would also allow its judgments to be questioned systematically by complainants who are dissatisfied with the Tribunal's decision.

5. The same holds for the plea that the Tribunal made a mistake of law by failing to reconcile rules that have the same force in law, and for the

**argument that the Tribunal misread the attributions of the Selection Committee.**

**6. The plea that the Tribunal disregarded the principle of adversarial proceedings by failing to address the Organization's position in law would carry some weight if it was sound. But it is not: it is plain from the judgment as a whole that in reaching its decision the Tribunal did take account of the FAO's arguments concerning the conjunction of the material provisions of the FAO Constitution, General Rules and Manual, even though it did not accept its conclusions. The application must therefore be dismissed, there being no need to rule on Mr Coates' objection to receivability.**

**7. The Organization shall pay Mr Coates 2,000 Swiss francs in costs.**

## DECISION

**For the above reasons,**

1. **The application is dismissed.**
2. **The FAO shall pay Mr Coates 2,000 Swiss francs in costs.**

**In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

***(Signed)***

**MICHEL GENTOT** **JEAN-FRANÇOIS EGLI** **SEYDOU BA**

**CATHERINE COMTET**

# NINETIETH SESSION

***In re* Rana (No. 2)** **Judgment No. 2030**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the second complaint filed by Mr Kishan Chand Rana against the World Health Organization (WHO) on 19 January 2000, the WHO's reply of 18 April, the complainant's rejoinder of 2 June and the Organization's surrejoinder of 4 September 2000;**

**Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which neither party has applied for;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant was employed in the General Service category of staff at the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. He retired on 31 March 1998. Salary scales in that category are reviewed regularly on the strength of comprehensive surveys of local practice; between such surveys there may be adjustments based on the results of "mini-surveys". Brief details about the rules and method governing such surveys can be found, under A, in Judgment 1160 (*in re* Banota and others).**

**A comprehensive salary survey was to take place in May 1994, but was postponed to March 1995. A mini-survey, to be undertaken by the Local Salary Survey Committee (LSSC), was therefore initiated in August 1994**

and completed in March 1995. The results of the mini-survey and the LSSC's recommendation were then forwarded to WHO headquarters. The LSSC recommended that there should be two revisions of the salary scale, on 1 November 1993 and on 1 May 1994. The comprehensive salary survey then took place in March and April 1995 and a new salary scale – Revision 37 – was announced to staff on 15 May 1995 and took effect retroactively from 1 July 1994.

Since the new scale was promulgated before WHO headquarters had reviewed the results of the mini-survey, it was decided to implement the results of the mini-survey by granting a lump-sum payment. Accordingly, by a memorandum dated 4 October 1995, SEARO informed the General Service staff that the Chief of the Policies and Recruitment Service at WHO headquarters had approved a salary increase of 18.4 per cent, covering the period from1 November 1993 to 30 June 1994. It was to be paid in the form of a non-pensionable one-off lump-sum bonus equivalent to 147.2 per cent of a month's salary as at 1 November 1993. The payment was reflected in pay slips of October 1995.

Twenty-nine staff members, including the complainant, appealed to the Regional Board of Appeal against the decision to implement the results of the mini-survey by way of a non-pensionable lump-sum payment. The Board recommended that the case be dealt with by the Headquarters Board of Appeal. In its report of 19 May 1999 the Headquarters Board concluded that, in granting a benefit other than that recommended by the LSSC, the Administration had not acted in breach of the salary survey manual of the United Nations' Consultative Committee on Administrative Questions (CCAQ), neither had it breached the methodology for implementing surveys that was drawn up by the International Civil Service Commission (ICSC). It nevertheless recommended paying the complainant a lump sum, in compensation for loss of pension rights, based on the life expectancy tables used for calculation purposes by the United Nations Joint Staff Pension Fund. In a letter of 27 September 1999, the impugned decision, the Director-General did not uphold the Board's recommendation.

B. The complainant objects to the fact that the Organization has implemented mini-survey results by paying a non-pensionable lump-sum, instead of introducing two revisions of the salary scales, as recommended by the LSSC.

He submits that WHO headquarters, the "responsible agency", ignored the recommendations of the LSSC and "violated the letter and spirit of the whole salary ... survey process". While acknowledging that under the terms of step F.3.5 of Part IV of the CCAQ manual the "responsible agency" may "introduce modifications to the survey results which it considers justified", he says the Administration has interpreted the word "modification" in too wide a manner, giving the impression that it can "do as it pleases". It cannot "turn upside down" the LSSC's recommendations. He cites step F.3.6 of the CCAQ manual, which states that "the revision concludes with the approval by the responsible agency of the salary scale and other allowances". Although WHO headquarters can make adjustments to salary scales, it cannot choose to grant a "bonus" instead of instituting salary increases, particularly since the bonus in question was non-pensionable.

While other staff may not have objected to such a payment, he emphasizes that he was particularly affected because he retired at the end of March 1998 and his pension rights were impaired. He says it caused him "a perpetual loss of pensionary benefits". The Organization's action was therefore "neither justified nor equitable".

He seeks compensation for the loss of pension rights, an award of moral damages and costs, as well as any other relief deemed justified by the Tribunal.

C. The Organization replies that, although it chose not to follow the LSSC's recommendation to implement the mini-survey results through two revisions of the salary scale, that does not mean that its decision to pay the lump sum was unlawful. It carefully considered the recommendation of the LSSC. It made the changes that it thought were justified, both in the amount of the salary increase and in the manner of implementing the increase. The role of the LSSC in the survey process is advisory in nature, and rejection of its recommendations cannot be construed as evidence of a flaw in the Organization's decision.

It points out that the ICSC methodology and the CCAQ manual do not prohibit payment of a non-pensionable lump sum. The Organization chose that way to implement the results of the mini-survey for objective reasons and did not breach any rules. The manner of payment was warranted because of the situation that prevailed at the time. It would have been "unsound" to implement the mini-survey by revising the salary scale when the comprehensive survey had just been carried out and the results implemented. That procedure could have led to "administrative anomalies". It explains that, in 1992, the ICSC decided that interim adjustments should not be made during a six-month period prior to the "reference date" of a comprehensive survey. However, the Organization approved the holding of the mini-survey at issue expecting it to have been completed well before the comprehensive survey began. Implementation of the results by way of a lump sum was not "out of the ordinary" in the United Nations common system in the particular case of a mini-survey being almost concomitant with a comprehensive survey. It names another United Nations agency that has paid such a one-off non-pensionable sum to its staff.

The Organization questions the receivability of the complainant's plea that he suffered loss of pension benefits. In his internal appeal he sought the quashing of the decision to pay the lump sum. It is only as a result of the recommendation of the Headquarters Board that he is now claiming compensation for loss of pension rights. The WHO views his claim for moral damages as irreceivable: he does not substantiate his claim and it was not put to the Board either.

D. In his rejoinder the complainant contends that, in paying the lump sum, the Organization violated his expectation that, following the mini-survey, his pensionable remuneration would increase from 1 November 1993. Since the CCAQ manual and the ICSC methodology allow payment of a lump sum only in the rarest of cases, he believes there was insufficient reason to substitute a revision of the pay scales by such a payment. In making the lump sum non-pensionable the WHO also violated the "letter and spirit" of the terms of his employment.

Since the WHO cites only one instance of an organisation paying a lump sum following a mini-survey, it has failed to show that such a "practice" exists within the United Nations common system. He questions the relevance of the defendant's contention that the six-month rule applying to interim surveys warranted payment by lump sum. In his view, since the results of the mini-survey were effective retroactively to 1 November 1993, and the reference date of the comprehensive survey was not until 1 July 1994, the six-month rule is not applicable and the Organization's argument is misleading.

The complainant points out that, although in his internal appeal he sought the quashing of the WHO's decision to make a lump-sum payment, he has dropped that claim as being without purpose because he has since retired. He contends that even if his claim to compensation for loss of pension benefits arose from the recommendation made by the Headquarters Board, the Tribunal is nonetheless competent to rule on it pursuant to Articles VII and VIII of its Statute. Moreover, his claim to damages is justified by the "blatantly" unlawful action of the defendant Organization which has caused him both moral and material injury.

E. In its surrejoinder the Organization maintains that it did not breach any right deriving from the complainant's terms of appointment. Since surveys do not necessarily result in salary increases no "expectation" can arise from them.

The purpose of mentioning the ICSC's decision of 1992 regarding the six-month rule was merely to show that the ICSC was aware that "administrative anomalies" could occur if a mini-survey was conducted too close to the date of a comprehensive survey. It did not rely on that rule in the present case, since the 1992 decision applied to headquarters duty stations. It points out that the reference date of the comprehensive survey was March 1995 and not July 1994 as stated by the complainant.

## CONSIDERATIONS

1. The complainant was a locally recruited staff member in the General Service category at the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. He retired on 31 March 1998.

2. The salary scales of locally recruited General Service staff are reviewed every three to five years on the basis of comprehensive surveys of

prevailing local practice. Interim adjustments are normally made on the basis of "mini-surveys". The manner of conducting salary surveys is governed by a "general methodology" produced by the International Civil Service Commission (ICSC). A manual about the application of the methodology has been prepared by the United Nations' Consultative Committee on Administrative Questions (CCAQ). As part of the process, a Local Salary Survey Committee (LSSC) composed of representatives of local staff and the local administration of the WHO, and other agencies, carries out the surveys, submits reports to the "designated agency" (in this case SEARO) which in turn sends reports and recommendations to the "responsible agency" (in this case WHO headquarters) for review and final decision.

3. The previous comprehensive survey having been carried out in January 1990, WHO headquarters decided in December 1993 to carry out a comprehensive survey in May 1994. This was later postponed to July 1994 and then had to be further postponed. Since a suggested date of October 1994 was not feasible it was rescheduled for March 1995.

4. When it became known that the comprehensive survey would be carried out in the first quarter of 1995 the Federation of United Nations Staff Associations requested SEARO in July 1994 to carry out a mini-survey immediately. It was started in August 1994 but not completed until March 1995. The results of the survey were sent to WHO headquarters on 10 March 1995. The LSSC recommended two revisions of the salary scales, the first representing an overall weighted average increase of 129.93 per cent with effect from 1 November 1993 and the other representing an across-the-board increase of 6.39 per cent with effect from 1 May 1994.

5. The comprehensive survey was carried out from 27 March to 6 April 1995 and as a result a new salary scale – Revision 37 – was announced to the staff on 15 May 1995 with retroactive effect from 1 July 1994.

6. By the time WHO headquarters had reviewed the results of the mini-survey, Revision 37 had been promulgated. So the decision was taken

to implement the results of the mini-survey in the form of a non-pensionable lump-sum payment equal to 147.2 per cent of one month's salary as at 1 November 1993. This was equal to an increase of 18.4 per cent per month from 1 November 1993, the earlier date recommended by the LSSC, to 30 June 1994, after which Revision 37 became effective. The decision was announced to the staff on 4 October 1995. The complainant appealed.

7. Owing to delays at the Regional Board of Appeal level, the complainant's appeal was considered by the Headquarters Board of Appeal. In a report of 19 May 1999 the Board found that the Organization had not acted in violation of the CCAQ manual and ICSC methodology in "implementing a benefit other than one which the LSSC had recommended". It concluded that only the complainant (and one other staff member) had suffered any real loss and recommended paying them a lump sum in compensation, together with costs.

8. The Director-General did not accept that recommendation and so informed the complainant in a letter of 27 September 1999. This is the decision impugned.

9. The complainant claims that while the "responsible agency" can make adjustments to salary scales, it cannot choose instead to pay a "lump sum non-pensionable bonus" which, he claims, resulted in a 12 per cent difference in his annual pension benefit.

10. The Organization did not contend that the lump-sum payment conformed to the LSSC's recommendation. It did contend, however, that under step F.3.5 of Part IV of the CCAQ manual it may "introduce modifications to the survey results which it considers justified". The comprehensive survey took into account the salary changes recommended following the mini-survey, so only the period prior to July 1994 was involved. The WHO states that payment of a lump sum is neither provided for nor precluded by the methodology or the manual. Since the mini-survey had taken far longer than was usual and was overtaken by the comprehensive survey, the Organization considered it was justified in paying a lump sum.

11. Step F.3 in Part IV of the CCAQ manual deals with the review of the survey results by the headquarters of the designated agency (in this case, SEARO) and the approval by the responsible agency (WHO headquarters).

According to step F.3.4, after reviewing the data and analysis, the designated agency either confirms the results as submitted, or proposes changes. It also reviews the recommended salary scale and proposes appropriate modifications if they are required.

At step F.3.5 the designated agency reports to the responsible agency. In completing its review the "responsible agency may introduce modifications to the survey results which it considers justified".

Step F.3.6 states: "The review concludes with the approval by the responsible agency of the salary scale and other allowances."

The Organization has interpreted the provision in step F.3.5, which enables it to introduce modifications to the survey results, as entitling it not to introduce the salary scale referred to in step F.3.6 but to substitute a lump sum instead. In the opinion of the Tribunal this is not permissible. The words of step F.3.6 clearly stipulate that "the review concludes with the approval by the responsible agency of the salary scale ...". Payment of a lump sum is not equivalent to the approval of a salary scale. The decision of the Director-General must therefore be quashed.

12. Because the complainant received a non-pensionable lump sum instead of a salary increase, his pensionable remuneration was affected. According to a memorandum of 15 April 1999 sent to the Headquarters Board of Appeal, if there had been an "across-the-board" salary increase from 1 November 1993 of 18.4 per cent, the difference in his "annual pension benefit" would have amounted to 12 per cent.

13. The Organization shall pay compensation to the complainant for loss of pension benefits resulting from the payment of a lump sum rather than an increase in salary. As requested by the Organization in the event of the Tribunal ruling against it, the life expectancy table used by the United Nations Joint Staff Pension Fund shall serve as a basis for calculating the amount of the pension the complainant would have received if there had

been a salary increase from 1 November 1993 to 30 June 1994 of 18.4 per cent. The complainant is not entitled to moral damages but is entitled to 1,500 United States dollars in costs.

## DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The Organization shall pay compensation to the complainant as provided under 13.
3. It shall pay him 1,500 United States dollars in costs.
4. All other claims are dismissed.

**In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

Flerida Ruth P. Romero

FLERIDA ROMERO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

**Organisation internationale du Travail** | **International Labour Organization**
*Tribunal administratif* | *Administrative Tribunal*

# NINETIETH SESSION

***In re* Facchin** **Judgment No. 2031**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the complaint filed by Ms Brigitte Facchin against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 15 September 1999 and corrected on 18 April 2000, the Preparatory Commission's reply of 30 May, the complainant's rejoinder of 14 August and the Commission's surrejoinder of 28 September 2000;**

**Considering Article II, paragraph 5, of the Statute of the Tribunal;**

**Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, a Swiss citizen born in 1939, is a former official of the CTBTO PrepCom. She joined the Provisional Technical Secretariat of the newly established CTBTO PrepCom in Vienna on 31 March 1997 at grade G.6. Under the terms of a letter of appointment dated 9 July 1997 she was appointed for a three-year period, retroactively to 31 March 1997, to the position of Associate Officer in the General Services Section at grade P.2. The letter specified that the provisions of the United Nations Staff Regulations and Staff Rules applied to staff of the Provisional Technical Secretariat. Clause 3 of the letter stated that such a fixed-term appointment "may be terminated prior to its expiration date in accordance with the**

relevant provisions [of the above-mentioned rules]". Clause 6 contained a special condition worded:

> "This appointment is subject to certification of completion of six months satisfactory service. Failure to obtain such certification will result in termination of this appointment, subject to 30 days written notice."

The complainant's six-month period of probation finished on 30 September 1997. Prior to that she had expressed interest in transferring to the International Monitoring System Division (IMS) as a training officer. The Director of Administration, who was her supervisor until the appointment of the Chief of General Services on 19 October, drew up a report on her performance and signed it on 6 October. He recommended terminating her appointment on the grounds that certain aspects of her service were "less than satisfactory". In a meeting with the complainant on 7 October, the Executive Secretary of the Preparatory Commission offered to extend her probationary period by six months on the same post. No action was taken on that matter, and on 15 October the complainant was informed that her appointment would be terminated on 30 November.

On 9 October 1997 the Commission issued two directives. Administrative Directive No. 2 formalised the legal framework for appraisal procedures. Administrative Directive No. 3 governed the probationary period: it specified that in the event of a staff member's performance being deemed unsatisfactory, the Executive Secretary could prolong the probationary period by six months if the staff member agreed – failing that, 30 days' written notice of termination would be given.

In an appeal of 12 November 1997 to the Executive Secretary, the complainant contested the decision to terminate her contract on the basis of her performance evaluation report. On the same day she contested the report by requesting a "rebuttal" procedure. An Ad Hoc Panel on Performance Appraisal was constituted to hear her case and issued its report on 25 November. It found that the appraisal had been conducted in a way that was consistent with the terms of Administrative Directive No. 2. On 26 November she received confirmation from the Executive Secretary that her contract would end on 30 November.

The complainant fell ill in the last days of November 1997. In letters sent to the Commission in March and early April 1998 she requested the extension of her contract and medical insurance coverage. On 8 April 1998 the Executive Secretary retroactively extended her contract to 7 December 1997 in view of her accrued sick leave entitlement.

On 19 December 1998 the complainant filed an appeal with the Joint Appeals Panel against the decision to terminate her appointment, claiming reinstatement and payment of outstanding salary and allowances. The Appeals Panel heard her case in April 1999, and in a report dated 26 May found that the decision to terminate her services was valid. It recommended rejecting her appeal. It also took note of the fact that under Annex III of the United Nations Staff Regulations, which were applicable at the time she was appointed, a termination indemnity may be paid. In a letter of 15 June 1999 to the complainant, the Chief of the Personnel Section confirmed the termination of her appointment and informed her of the Executive Secretary's decision to offer her a termination indemnity of 4,213 United States dollars "in full and final settlement" of any claims. That is the impugned decision.

B. The complainant contends that the Commission could not end her contract before its expiration date without complying with the relevant provisions of the United Nations Staff Regulations and Rules which governed her appointment. Her contract was for a fixed term of three years, and not for six months, with the possibility of extension to three years. Regarding the quality of her services, she stresses that the initial period in the Commission was "chaotic", that she had to master a huge workload and received no job description.

Her main plea is denial of due process on several counts. (1) There was undue delay in setting up the appeal mechanism to deal with her case. (2) The Commission took the decision to end her appointment before the rebuttal procedure regarding her performance appraisal report was completed. (3) Her working relationship with her supervisor was "strained"; she was thereby denied an impartial assessment. (4) Her supervisor's appraisal of her performance was tainted with prejudice. (5) The Commission did not allow her access to documents that she wanted to consult to prepare her case; indeed it told her the documents had been destroyed. Personal documents remained in her office and she could not retrieve them. (6) The job offer from IMS was "jeopardised by unfair practices". Her supervisor drafted her appraisal report after she had asked him for permission to leave his division, and he did not immediately disclose to her that he intended to recommend the termination of her appointment. Because of the unfavourable appraisal the IMS withdrew its offer. She therefore views the performance report as being "unfair and harmful".

She maintains that there were procedural irregularities at the hearing before the Joint Appeals Panel. She takes issue with allegations made by one of the witnesses who was present. Moreover, neither she nor her counsel had been informed of the names of witnesses who would appear. Not having been informed of certain allegations beforehand she had no real opportunity to rebut them.

She asks the Tribunal to rule that she has been denied due process and order the quashing of the impugned decision. In compensation she seeks "full pay and benefits" up to 30 March 2000, the date her contract was originally to end. She seeks a ruling pursuant to Article VIII of the Tribunal's Statute that the Commission is to: pay all her outstanding entitlements "including salary and other benefits" due under the terms of her contract and the United Nations Staff Rules; pay all her outstanding contributions to Van Breda for her health insurance; and arrange payment of all outstanding medical expenses due to her, as well as a bill from the Tulln Hospital, including interest and penalties for late payment. She seeks damages for the delay in "dealing with the merits of her grievance"; the removal of the appraisal report from her personal file; the issuing of a "report and certificate which reflect the truth"; and an apology from the Preparatory Commission.

C. The Commission replies that its decision to terminate her contract was valid since the complainant failed to meet the probationary requirement of six months' satisfactory service. Moreover, the decision was carried out in accordance with the applicable rules.

It contests her allegation that she had no job description: she had a "sufficient description" of the duties she was to perform. Job descriptions for the whole staff were drawn up in late 1997. Prior to that supervisors defined tasks with staff members. In the first six months of its existence the

Commission was establishing administrative procedures. It made every reasonable effort to respect the complainant's right to due process. Any delays that occurred in dealing with her grievance were ultimately to the complainant's advantage.

The performance report was drawn up on 6 October 1997 at the Personnel Section's request. By offering the complainant a six-month extension of her probationary period, the Executive Secretary gave her a chance of complying with the requirement of six months' satisfactory service. Since she declined that offer, termination ensued in accordance with the provisions of Directive No. 3. The Executive Secretary took his decision on the basis of the appraisal made by the complainant's supervisor, and on the complainant's comments thereon. The complainant was given an opportunity to state her case. She has moreover failed to show that her supervisor's evaluation was motivated by prejudice.

The Commission denies that there was an offer of employment for her in the IMS Division. The Director of the Division would have had no authority to make such an offer and any sign of willingness to consider her candidacy could not give rise to a legitimate expectation of an offer.

It denies refusing her access to certain documents. The Appeals Panel found such accusations to be false and the complainant has not substantiated them. As reported by the Panel, the personal papers left in her office were transferred, in the presence of a witness, to a locked cupboard and then, in April 1998, were transported to her home by a driver. It takes up her allegations of procedural shortcomings at the Appeals Panel hearing. The witness referred to by the complainant presented evidence which had no bearing on the decision to terminate her appointment. She had every opportunity to call her own witnesses or to cross-examine those present at the hearing.

Notwithstanding the production of inadequate medical certificates the Commission extended the complainant's appointment to 7 December 1997, to allow her to use the remainder of her sick leave entitlement. As regards salary and medical premiums, it discharged its obligations toward her in full, until the revised separation date. It also extended her medical coverage to 31 December 1997.

D. In her rejoinder the complainant enlarges on her pleas.

She asserts that she did not see copies of Administrative Directives Nos. 2 and 3 when they were issued in October 1997. She refers to a letter of 9 May 2000, which the Commission failed to copy to her. The letter indicated that on 12 March 1998, the Commission had written to Van Breda to cancel the complainant's insurance coverage retroactively to end of 1997. Also, the letter reveals the Commission's bad faith as it was aware that she had been hospitalised and was still ill on 12 March. She contests its view that the medical certificates she sent in were "invalid".

She is of the opinion that the Commission filled her post before the rebuttal procedure was finalised. As for the extension of the trial period, she had agreed to such an extension provided it was in the IMS Division, where she had hoped to be transferred.

E. In its surrejoinder the Commission submits that it is of no consequence that the complainant may have consented to a six-month extension of her probationary period in a different department, since no such offer was ever made to her.

The fact that she did not see certain administrative circulars while she was still a staff member does not advance her case. Contrary to her allegations, the administration did not retroactively cancel the complainant's health insurance in its letter of 12 March 1998 to Van Breda; it merely confirmed instructions it had given orally to Van Breda at the time of the complainant's separation in December 1997.

As regards filling her post, the staff member mentioned by the complainant moved into the General Services Section in February 1998 – two months after the complainant's separation. Moreover, the Commission points out that there is no foundation for her allegation that the decision to end her employment was taken before the rebuttal procedure was finalised, since the decision to confirm her termination was taken on 26 November 1997 – after the Ad Hoc Panel on Performance Appraisal had issued its report.

## CONSIDERATIONS

1. The complainant entered the service of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 31 March 1997. On 9 July she was appointed for three years as an Associate Officer at grade P.2 in the General Services Section with retroactive effect to 31 March 1997. Her letter of appointment stated in clause 6 that her appointment was "subject to certification of completion of six months satisfactory service. Failure to obtain such certification will result in termination ... subject to 30 days written notice."

The Staff Regulations and Rules of the United Nations were applicable *mutatis mutandis* to the contract of employment, in accordance with a decision taken by the Commission at its first session in New York in November 1996.

2. The complainant's probationary period having ended on 30 September 1997, she received a performance appraisal report on 6 October assessing ten aspects of her work. Two of them were deemed "satisfactory" and seven were rated "less than satisfactory".

3. The supervisor's overall appraisal reads: "I do not recommend that Ms Facchin be continued past her probationary period except to give her notice of her termination and to give her adequate time to plan for that eventuality." The complainant refused to sign the report.

4. On 7 October the complainant had a meeting with the Executive Secretary who orally offered to extend her probationary period, in the same position, for six months to enable her to complete the six months of satisfactory service required by her letter of appointment. The complainant orally declined the offer and instead informed the Administration that she would accept such an extension only if she were assigned to a different position in the Commission; she alleged that she was considering an offer to transfer to the International Monitoring System Division (IMS). The Commission denies that any such offer, oral or written, was ever made and says that in any event the Director of that Division had no authority to make such an offer; to do so was the sole prerogative of the Executive Secretary.

5. On 15 October the Executive Secretary informed the complainant that her contract would be terminated on 30 November. To give her time to attend to personal arrangements, she would be given six weeks' notice.

6. In the meantime the complainant submitted to the Chief of the Personnel Section and the Executive Secretary a rebuttal, dated 12 November 1997, of her performance appraisal report.

7. On 18 November the Chief of Personnel informed the complainant of the establishment by the Executive Secretary of an Ad Hoc Panel on Performance Appraisal. It was asked to consider whether the appraisal report had been completed in accordance with the relevant administrative directives. On 25 November the Panel submitted its report to the Executive Secretary, concluding that the terms of Administrative Directive No. 2 had been respected. The report stated that the Panel had not considered the substance of the appraisal report, because it had not been asked to do so.

8. In a letter of 26 November 1997 the Executive Secretary confirmed that the complainant's contract would be terminated on 30 November.

9. The complainant fell ill before that date and took sick leave from 27 November 1997 until 26 April 1998.

In several letters written in March and April 1998 she requested an extension of her contract and medical insurance coverage for the period of her illness. In a letter of 8 April 1998 the Executive Secretary informed the complainant that he agreed to extend her appointment to 7 December 1997 in order to enable her to use the remainder of her sick leave entitlement.

10. By an administrative directive of 25 May 1998 the Commission established the Joint Appeals Panel to which the complainant appealed. On 28 April 1999 the hearing was conducted and the Panel's report was submitted to the Executive Secretary on 26 May 1999. The Panel upheld the decision of the Executive Secretary to terminate the complainant's appointment since she failed to meet the requirement of six months'

satisfactory service which was necessary to have the appointment confirmed.

11. By a letter of 15 June the Chief of Personnel informed the complainant that the Executive Secretary maintained his decision to terminate her appointment on the grounds that she had failed to meet the probationary requirement of six months' satisfactory service. He said that the Executive Secretary had decided to offer her a termination indemnity in the amount of 4,213 United States dollars "in full and final settlement of any claim against the Organization", an offer to which she did not respond. The complainant received that letter on 24 June. On 3 July she received a copy of the Panel's report under cover of a letter dated 25 June from the Chief of Personnel.

12. On 15 September 1999 the complainant filed this complaint with the Tribunal seeking the following relief:

(1) that the Tribunal quash the challenged decision on the grounds that she has been denied due process;

(2) that the defendant organisation pay her:

- compensation of "full pay and benefits to the end of her contract ... on 30.03.2000";
- "all outstanding entitlements including salary and other benefits" due under the terms of her contract and the applicable United Nations Staff Rules;
- all her outstanding contributions to Van Breda for her compulsory medical insurance, and arrange payment of outstanding medical expenses and a hospital bill;
- damages for the injury she has suffered due to the "delay in dealing with the merits of her grievance";

(3) the removal of the "unfair and harmful" appraisal report from her personal file;

(4) the drawing up of a "report and certificate which reflect the truth"; and

(5) an apology from the defendant organisation.

13. Her claim that the challenged decision should be quashed is based on her contention that she has been denied due process. More specifically, she avers that there was undue delay in dealing with her grievance through the belated setting up of the legal mechanism to deal with her case. The Commission never replied to her counsel's offer of an amicable settlement; nor was it willing to recognise on a once-only basis an already established Appeals Board of another United Nations agency.

The Commission replies that it had to confront the stark reality that, as an institution established on 19 November 1996, it was still in the process of setting up structures, systems and procedures. It is *à propos* to state that the complainant was only the eighth staff member employed after the CTBTO PrepCom began its operations in Vienna on 17 March 1997. However, when she filed a rebuttal of her performance appraisal report, the Executive Secretary immediately appointed – on 18 November 1997 – an Ad Hoc Panel with terms of reference to guide it in determining whether the report was consistent with the procedure described in the relevant Administrative Directive No. 2 of 9 October 1997. Seven days later – on 25 November 1997 – it submitted its report to the Executive Secretary.

14. Approximately six months later, a Joint Appeals Panel was established under Administrative Directive No. 22 of 25 May 1998. In the succeeding months, the composition of the Panel was finalised: it was then reconstituted upon objections from the complainant to two of its members. Finally, a hearing was held on 28 April 1999 and the report of the Panel submitted to the Executive Secretary less than a month later – on 26 May 1999. There was no undue or inordinate delay in the Joint Appeals Panel being set up and commencing its work. In any event, a delay in the internal appeal process could never allow a complainant to succeed on the merits; at most it might entitle him or her to appeal directly to the Tribunal.

15. The Commission admits that it declined to recognise the jurisdiction, even on an exceptional basis, of an established appeals board of any other international agency because of the lack of any agreements between CTBTO PrepCom and any other organisation having the approval of their respective governing bodies.

The delay which she pleads even worked to the advantage of the complainant for it enabled her to file her complaint with the Tribunal. The Commission deliberately made its recognition of the Tribunal's jurisdiction retroactive to 25 August 1999, the day its StaffRules were promulgated, and not from November 1999, the date on which the Governing Body of the International Labour Office approved the recognition, otherwise the present complaint would have been excluded for want of jurisdiction. It has been pointed out that the complainant herself contributed to the protracted process by her requests for the "longest possible" extension of the time limit for submitting her corrected complaint and an additional exceptional extension for submitting more documents.

16. As regards the proposal to settle the dispute amicably, the Executive Secretary of the Commission was under no duty to accede to it. During the process of internal appeal the complainant was allowed to be represented by a serving or retired staff member of the Commission or even by a staff member of another international organisation.

17. The complainant's adverse performance appraisal report was transmitted to her on 6 October 1997. Thereafter, the Executive Secretary decided to terminate her probationary appointment.

18. On 7 October 1997 the Executive Secretary orally offered the complainant an extension of the probationary period for a further six months. The Chief of Personnel reiterated that offer the next day. On both occasions she declined on the grounds that she would only accept it if she were assigned to a different position in the Commission; besides, she said that she was considering an offer to transfer to the IMS Division.

19. At the hearing before the Joint Appeals Panel, the Director of that Division declared that he made the complainant no formal offer of a position as he did not have authority to do so. Moreover, he himself had doubts as to whether the planned structure would be implemented. In fact, it never was, and the position he had in mind for the complainant did not exist at the time of the hearing. The complainant herself admitted that she had received no written offer, only an oral one. Having declined the offer to have her

probationary period extended for six months, the complainant was given notice of termination.

20. On 12 November 1997 the complainant filed a rebuttal of her performance appraisal report but, before the procedure was finalised, her employment was terminated. She contends that she was therefore denied due process; moreover, the Ad Hoc Panel set up to review the report did not look at the substance but only the form.

21. The Tribunal holds that while there may indeed have been lapses in the rebuttal process, these were offset by the Executive Secretary's assiduousness in affording the complainant every opportunity to present her case. She submitted a considerable amount of correspondence to the Executive Secretary during the period from 6 October to 30 November 1997. As a result of these representations, she was offered an extension of her probationary period, which she declined. The Joint Appeals Panel concluded: "If there has been a denial of justice in this process, it is that the applicant has denied herself an opportunity to start anew."

22. The complainant's assertions that her performance appraisal was influenced by extraneous factors and that the report was arbitrary, prejudiced, "unfair and harmful" are not tenable. Her allegation that she was denied access to documents essential to her case is without foundation since the Commission has shown that it took steps to place her personal files in her possession.

23. In view of the foregoing findings, the complainant is not entitled to any compensation, payment of expenses, damages or other benefits claimed in her complaint.

## DECISION

For the above reasons,

The complaint is dismissed.

**In witness of this judgment, adopted on 16 November 2000, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

Mella Carroll

**MELLA CARROLL**

James

**JAMES K. HUGESSEN**

Flerida Ruth P. Romero

**FLERIDA ROMERO**

**CATHERINE COMTET**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

# NINETIETH SESSION

***In re* Krutzsch** **Judgment No. 2032**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Walter Friedrich Krutzsch against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 22 December 1999 and corrected on 17 January 2000, the OPCW's reply of 16 February, the complainant's rejoinder of 17 April, and the Organisation's surrejoinder of 24 May 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German national born in 1927, was employed by the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons as a legal expert under a series of intermittent short-term contracts between January 1994 and May 1997. On 23 May 1997 the Preparatory Commission ceased to exist. Thereafter he was intermittently employed by the OPCW under a series of short-term contracts until December 1998. Staff members of the Preparatory Commission benefited from immunity from taxation on their salaries. The complainant's status as a staff member was expressly stated in his letters of appointment, which also made reference to his rights under the staff regulations and staff rules.

In 1995 the complainant declared his 1994 income to the tax authorities in Germany. This included the income he earned while employed by the Preparatory Commission. At the same time he informed the tax authorities that the Preparatory Commission was an intergovernmental organisation and that its staff members were exempt from taxation. This information was disregarded and the complainant's tax liability was assessed at 15,864 German marks.

After a series of communications with the German tax authorities, the German delegation to the Preparatory Commission, and the German Ministry of Foreign Affairs, on 18 March 1996 the Berlin tax office informed the complainant that he had been granted a partial deferment of his 1994 taxes in the amount of 12,833 marks. He was nevertheless ordered to pay a non-deferred amount of 3,031 marks by 9 April 1996. He was also informed that should his tax-exempt status be rejected he would be liable for interest of 0.5 per cent per month on the deferred amount.

The complainant paid 3,031 marks on 29 March 1996 to the Berlin tax office and requested a refund from the Preparatory Commission in an internal memorandum of 31 October 1996 addressed to the Director of the Administration Division. In November 1997 the OPCW refunded the complainant 3,031 marks on the condition that he was to return the money to the Organisation if the German authorities later exempted him from paying tax on his Preparatory Commission earnings.

Thereafter the OPCW applied to the Government of Germany for a refund of the amount it had reimbursed the complainant. On 2 July 1998 the Head of the Permanent Representation of the Federal Republic of Germany informed the OPCW's Director of the Administration Division that the basis for the tax assessment "was not the salary that Dr. Krutzsch received from the [Preparatory Commission], but other income"; therefore it was correct to have required him to pay taxes. Consequently, on 23 July 1998 that Director requested that the complainant return the money he had been reimbursed in November 1997.

After another series of discussions and correspondence, on 10 December 1998 the Director of the Administration Division again requested the complainant to return the 3,031 marks until he was able to show that it was clearly attributable to his Preparatory Commission income and not income from other sources. Furthermore, the Director informed him that the OPCW would reimburse future taxes paid by him on income earned from the Preparatory Commission only if the Organisation was reimbursed by the Government of Germany. Additionally, since there was no tax reimbursement agreement between the Organisation and Germany, the OPCW could not guarantee that it would reimburse him for any future taxes paid on his earnings received from the Organisation.

On 21 December 1998 the complainant filed an appeal against this decision with the Appeals Council. In its report dated 4 October 1999 the Council found that the complainant had not exhausted all remedies within the German fiscal system and recommended that the Organisation wait before pursuing the refund of the 3,031 marks until the German tax authorities had determined the final amount it would require the complainant to pay.

On 5 October 1999 the complainant received, following his request, a written statement from a German tax office that, without his income from the Preparatory Commission, he would have paid no tax for the year 1994. On 19 October he sent a copy of this statement to the Director-General. In a letter of 5 November 1999 the Director-General rejected the complainant's appeal. That is the impugned decision. On 12 November 1999 the Director-General informed the complainant that while it was not for him to evaluate the "evidentiary status" of the statement from the German tax office, he would nevertheless transmit it to the Appeals Council to be dealt with under its rules of procedure.

B. The complainant contends that he is exempt from taxation under the Convention which created the OPCW, the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies, and Article 3.3 of the Preparatory Commission's Staff Regulations. He submits that immunity from taxation is necessary for "the independent exercise of the staff members' functions" and argues that it is the OPCW that should take up his cause with the German authorities; to require a staff member to resolve such an issue is tantamount to inviting instructions from a government, which is contrary to the principles of the international civil service. Furthermore, he argues that to make the refund of taxes contingent upon a tax reimbursement agreement between an organisation and a member State offends against the practice of international organisations. Different categories of staff are thus created, which violates the principle of equal treatment.

He submits that the statement he forwarded to the Director-General from a German tax office provides the required proof that he would not have been liable for taxes in 1994 without his salary from the Preparatory Commission.

The complainant contests the Organisation's view that it is not obliged to "absorb the loss" of taxes not refunded by a member State. His salary included a "staff assessment" which is meant to ensure that the Organisation has the resources to make refunds to staff members even without being reimbursed by a member State. During the appeals procedure the OPCW submitted that the complainant's case was "exceptional" because of his continued resident status in Germany. He contends that this is discriminatory and against Staff Rule 1.5.02. Finally, he argues that there has been an unconscionable delay in resolving his tax liability issue. Not only has the problem been unresolved for nearly five years, but it has caused him a great deal of financial uncertainty.

He requests the Tribunal to: (1) quash the decision that he should repay 3,031 German marks; (2) order the OPCW to reimburse him: for any taxes he has paid or is required to pay on salary, allowances, and other benefits received from the Preparatory Commission; for any taxes he has paid or is required to pay on his OPCW salary, allowances, and other benefits; for any interest he may be required to pay to the German tax authorities on the deferred tax amounts; and (3) order that he be paid costs.

C. In its reply the Organisation points out that the complainant has been reimbursed 3,031 marks for the taxes he paid. However, it now claims this money back, contending that the reimbursement was premature because it learned that the tax assessment was based on more than just his income from the Preparatory Commission.

The OPCW makes several pleas that the complaint is irreceivable. It argues that only the tax reimbursement in respect of 1994 is at issue. Claims relating to other years are hypothetical because the complainant has not formally submitted any other requests for reimbursement; therefore such claims are irreceivable in the context of the present case. Alternatively, in the event that the complainant has already submitted such claims to the Organisation, they are premature because it has yet to give a final ruling. His entire complaint is irreceivable because "he still has to demonstrate that he has exhausted his [...] legal remedies in Germany". Finally, it argues that the complaint cannot be receivable until the complainant has clarified a number of issues put to him by the OPCW.

The concept of the staff assessment at the OPCW is "only notional" and no money is credited to the Organisation's budget. Therefore, it has no means of reimbursing a staff member for taxes paid if it is not reimbursed by a member State. The burden is on the complainant to prove that the taxes were assessed on the income paid by the OPCW, and he has failed to do so.

D. In his rejoinder the complainant contends that he was entitled, under the staff regulations and staff rules, to a refund of taxes. He objects to the OPCW's argument that its accounting method does not allow it to reimburse taxes without receiving a refund from the member State concerned; this is no excuse for not following its Staff Regulations.

The Organisation's insistence that the complainant must exhaust all national remedies has placed the burden to protect his immunity from taxation on him, which breaches the Organisation's obligations. He submits that the Organisation has been unreasonable in the level of proof it requires him to provide; it wants him to furnish a "notional tax return" which is incompatible with the German tax system. Nevertheless, he has submitted other proof that he would not have been liable for taxes in 1994 without his income from the Preparatory Commission but the Organisation has ignored it.

The complainant refutes the OPCW's statement that he has not formally submitted any other requests for reimbursement of taxes. In fact he sent a letter to the Director of the Administration Division on 30 November 1999 claiming reimbursement of the taxes paid for the years 1995 and 1997. He also submitted proof that he would not have been liable for those payments without his income from either the Preparatory Commission or the OPCW. He asks the Tribunal to take note of this formal request and the fact that it went unanswered for more than sixty days.

E. In its surrejoinder the Organisation maintains that it was an error to reimburse 3,031 marks to the complainant. It was done before it knew that his tax liability was based on more than just his income from the Preparatory Commission. Since the complainant has not shown that his income from the Commission alone would have incurred the tax liability it has demanded the money back.

On the issue of the claims for reimbursement for the years 1995 and 1997, the date on which he submitted them "is irrelevant since it relates to a matter upon which no administrative decision has been taken". The complainant must wait for a decision from the Director-General before he can file a complaint with the Tribunal. The OPCW presses the other pleas in its reply.

## CONSIDERATIONS

1. The complainant challenges a decision of his former employer, the OPCW, requiring him to refund the sum of 3,031 German marks which it had paid to him in reimbursement of German income tax for the year 1994 that he had paid.

2. On 13 January 1993 the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (hereinafter "the Chemical Weapons Convention") was opened for signature. Upon its entry into force the OPCW would be established under Article VIII of the Convention. During the signing

ceremony of the Convention, the signatory States adopted a resolution (hereinafter "the Paris Resolution") establishing the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons (hereinafter "the Preparatory Commission"), an intergovernmental organisation composed of all signatory States. The Preparatory Commission was mandated to appoint its Executive Secretary and to establish a Provisional Technical Secretariat. The property, functions and recommendations of the Commission would be transferred to the OPCW at the first session of the Conference of the States Parties. On 29 April 1997 the Convention entered into force. The OPCW and its organs came into existence. On 14 May 1997 the Conference of the States Parties approved the Protocol regarding the Transfer of Assets, Liabilities, Records and Functions from the Preparatory Commission to the OPCW. On 23 May 1997 the First Session of the Conference of the States Parties concluded and the Preparatory Commission ceased to exist.

3. The complainant, a German citizen and resident of Germany, was intermittently a staff member of the Preparatory Commission between January 1994 and May 1997, under a series of short-term contracts at grade P.4 as a legal expert on the Chemical Weapons Convention. His letters of appointment provided for rights concerning immunity from taxation on earnings received from the Preparatory Commission as derived from the Paris Resolution. Paragraph 18 of the text attached to that Resolution states that:

> "The Host Country undertakes to accord the Commission, its staff, as well as the delegates of signatory States such legal status, privileges and immunities as are necessary for the independent exercise of their functions in connection with the Commission and the fulfilment of its object and purpose ..."

4. The Headquarters Agreement concluded between the Preparatory Commission and the Kingdom of the Netherlands, including Germany as a member State, states in Article 11(d)(i) that:

> "Staff members below rank P.5 and staff members having Netherlands nationality shall enjoy privileges and immunities in conformity with Article VI of the Convention on the Privileges and Immunities of the Specialized Agencies ..."

5. Section 19 (b) of Article VI of that Convention provides that officials of specialised agencies are exempt from taxation in respect of the salaries and emoluments paid to them.

6. Regulation 3.3 of the Preparatory Commission's Staff Regulations, which were adopted by the Commission, including Germany as a member State and which entered into force on 1 October 1993, reads:

> "a. In the event a staff member is subject to national income taxation with respect to the net salaries and emoluments actually paid to him or her by the Commission, the Executive Secretary is authorized to refund to him or her the amount of those taxes paid.
>
> b. Payments made in accordance with the provisions of the present Regulation shall be reimbursed as prescribed by the provisions of a Tax Reimbursement Agreement, bilaterally negotiated between the Executive Secretary and the Member State concerned."

7. The temporary presence of the complainant in the Netherlands during periods of employment with the Preparatory Commission and the OPCW was not sufficient to affect his status as a resident of Germany for German national tax purposes. Accordingly, the complainant was assessed for German national income tax for the year 1994 and by an internal memorandum dated 31 October 1996, the complainant:

- informed the Commission that an amount of 15,864 marks had been assessed by the German tax authorities as being owed by him on the salary and emoluments he had received from the Commission;
- declared that he had contested this assessment with the German tax authorities and said that they had agreed to defer the payment of 12,833 marks on the proviso that, should the tax assessment be upheld, the complainant would be liable to pay the balance plus 0.5 per cent interest per month; and
- said he had been requested to pay immediately the sum of 3,031 marks.

8. On 15 October 1997 the complainant filed a claim with the OPCW for reimbursement of the sum of 3,031 marks in accordance with Staff Regulation 3.3 for taxes paid to the German authorities for 1994. On 16 October 1997 the Head of the Human Resources Branch requested the

Director of the Administration Division to approve the refund to the complainant. That request was made on the understanding that, should the German tax authorities exempt him from paying tax on his earnings from the Commission, he would refund the amount. The reimbursement was duly made and thereafter the OPCW requested the German authorities for a refund. The German authorities replied by letter dated 2 July 1998:

> "It is true that the income tax for Mr. *and* Mrs. Kratzsch in 1994 was put at 3.031-. DM. The basis for this was not the salary that Dr. Kratzsch received from the [Preparatory Commission], but other income. In addition income of Mrs. Kratzsch was taken into account. The income that was taken into account falls … clearly under the German tax authority."

9. On 10 December 1998 the OPCW demanded that the complainant refund the sum of 3,031 marks until he could show that that sum was clearly attributable to his Preparatory Commission income separate from other income. The complainant contested this administrative decision and filed a statement of appeal on 21 December 1998 with the Appeals Council. On 4 October 1999 the Council completed its report on the matter and forwarded it to the Director-General. It found that the complainant had not exhausted the remedies under the German fiscal system and that he had not clarified the income upon which the tax he was claiming was based. Shortly afterwards, the complainant received a written statement dated 5 October 1999 from a German tax office comparing what his tax assessments would have been without earnings received from the Organisation and with such earnings in the years 1994 to 1998. According to that document, the tax assessment without such earnings would have been "zero" in 1994. This statement was forwarded to the Director-General on 19 October 1999 who received it on 25 October. In a letter of 5 November 1999, the Director-General's final decision on the appeal was conveyed to the complainant. The decision was to continue to claim the refund of 3,031 marks unless the complainant could "demonstrate conclusively that the DM 3,031 tax levied … was exclusively on [his] Preparatory Commission salary and emoluments". That is the impugned decision.

10. By a letter dated 12 November 1999, the Director-General responded to the complainant regarding the fiscal statement of 5 October

1999 which the complainant had submitted to him in support of his claim. The Director-General said that consideration of the statement "would have been outside the procedure". He asserted, without any explanation, "that the document [was] from a private tax office and not from the German Government tax authorities"; the complainant was again reminded that he could appeal against the tax assessment to German authorities.

### *Analysis*

11. The only issue to be decided in this case is whether the complainant was properly reimbursed for the tax, in the amount of 3,031 marks, assessed by the German authorities for the year 1994, since no other requests for tax reimbursements have been formally submitted by the complainant and no other demands for repayment thereof have been made by the Organisation. Accordingly, the Tribunal will only render a decision on this matter for the 1994 tax year.

12. The Tribunal cannot accede to the complainant's request that it render a decision with regard to assessments that have not been made and claims that have neither been asserted by him nor responded to by the Organisation. That is not to say, however, that the consideration given by the Tribunal to the claim which is before it will not provide some guidance to the parties and assist them in finding a solution to similar problems if they arise in years to come.

13. The Tribunal finds the position of the Organisation with regard to the statement issued by a German tax office on 5 October 1999 to be wholly incomprehensible. That fiscal statement is not, as the Director-General asserts in his letter of 12 November 1999, from a private tax office, (a position not repeated in the Organisation's pleadings before the Tribunal), but even if it were, it is, in the absence of any evidence to the contrary, quite enough to prove that the complainant incurred German taxes in 1994 solely because he had received income which was in

principle exempt from tax; if he had not received the tax-exempt income he would not have been taxed in 1994. The production of such evidence was the very condition which the Director-General purported to place upon the complainant in the impugned decision and it was fulfilled even prior to the date of that decision. The assertion that the statement was received only after the date of the Appeals Council's report and that it should have been sent directly to the Appeals Council to be taken into consideration together with other evidence is irrelevant. The OPCW's argument that the complainant must prove his case "beyond a reasonable doubt" is entirely mistaken; the impugned decision reflects a similar error in requiring that the complainant prove "conclusively" that his German tax was imposed upon his Preparatory Commission income. While the complainant no doubt has the burden of proving his case, this will be determined on the weight of the evidence submitted.

14. Nor is there any justification for the Organisation's objection to the fiscal statement on the grounds that it is "hypothetical". Where a State imposes tax upon its nationals who are international civil servants in receipt of income – some of which is tax exempt and some of which is not – the only proper method of determining how much tax should actually be paid is to calculate the hypothetical amount which would be due if the exempt income had not been received. The complainant has done just that and has shown that if he had not been in receipt of income from the Commission he would not have been subject to German tax on his (and his wife's) remaining income.

15. The provisions of the Preparatory Commission's Staff Regulation 3.3 do not make a staff member's right to reimbursement contingent upon the existence of an agreement between the Commission and the relevant member State. The Regulation clearly mandates an agreement between the Commission and the member States in order to give effect to the tax exempt status of the staff members and not for the purpose of protecting the tax revenues of those States. It would be strange indeed if the absence of such an agreement could be invoked by an

international organisation or its member States to deprive some staff members and not others of their tax-exempt status. If a member State in breach of its international obligations taxes the exempt income of a staff member, the reimbursement of that tax cannot be made to depend upon the grace and favour of that State.

16. Nor does the Tribunal find any merit in the Organisation's submission that the charges it makes upon the complainant's earnings by way of staff assessment* are purely "notional" with the consequence that "there is no budget or resources from which taxes can be refunded if the State Party does not actually refund the OPCW for the amount of taxes collected". That is simply a matter of the Organisation's own internal management and cannot be used as a weapon to deprive the complainant of his rights. One of the purposes of staff assessment is surely to put the Organisation in funds to protect its employees against States which refuse to recognise their tax-exempt status. If the Organisation chooses to credit its member States with the amount of such assessments without actually collecting them it can only blame itself for any resulting loss.

17. The Tribunal notes that while the Organisation suggests it was an error for the complainant to have been given the rank of a full-time staff member, it does not seek to deny him that status. Nor does it at any time deny the complainant's claim to be entitled to exemption from national taxes on his income from the Preparatory Commission. Rather it takes the position that because he is and was at all material times a resident of Germany it is for him alone to fight out the question of tax exemption with the German authorities. This is wholly unacceptable. If the Organisation does not (and clearly now it cannot) contest the exempt status of the complainant, it is its duty to protect him against the claims of the authorities of a member State, to reimburse him the amount of tax he has paid to the State, and to employ its own considerable power, authority and

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*Under the terms of Staff Rule 3.3.01 pertaining to the Preparatory Commission's Staff Regulation 3.3, staff assessment is "an amount consisting of the difference between the net and gross salary as it appears in the salary scale for staff members ..."

influence to have the German authorities change their position. Exemption from national taxes is an essential condition of employment in the international civil service and is an important guarantee of independence and objectivity. It cannot be made to depend upon the whim of national taxing authorities who will be understandably reluctant to admit any exceptions to their claims. By requiring him to appeal against his German tax assessment while conceding the tax-exempt status of his Preparatory Commission income the Organisation has failed in its duty to the complainant.

18. The complaint must be allowed and the impugned decision must be set aside. The complainant is entitled to a declaration that he had the right to be reimbursed for the German income tax actually paid by him in respect of the year 1994.

19. The complainant is entitled to his costs in the amount of 1,000 euros.

## DECISION

For the above reasons,

1. The impugned decision is set aside and it is declared that the complainant was entitled to be reimbursed by the OPCW for the German income tax actually paid by him in respect of the year 1994.
2. The OPCW shall pay the complainant 1,000 euros in costs.

**In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

Michel Gentot

MICHEL GENTOT

James K Hugessen

JAMES K. HUGESSEN

Flerida Ruth P. Romero

FLERIDA ROMERO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

Organisation internationale du Travail International Labour Organization
*Tribunal administratif* *Administrative Tribunal*

# NINETIETH SESSION

***In re* Hijzelendoorn** **Judgment No. 2033**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the complaint filed by Mr Johannes E. H. Hijzelendoorn against the European Patent Organisation (EPO) on 18 October 1999 and corrected on 1 November 1999, the EPO's reply of 19 January 2000, the complainant's rejoinder of 5 April and the Organisation's surrejoinder of 26 June 2000;**

**Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;**

**Having examined the written submissions and disallowed the complainant's application for hearings;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, who is of Dutch nationality, joined the staff of the former International Patent Institute at The Hague in 1975. In January 1978 the Institute was incorporated into the European Patent Office, the secretariat of the EPO, as Directorate-General 1 (DG1). The complainant became a formalities officer I at grade B4 on 1 December 1989.**

**In November 1992 a policy of diversification and decentralisation of tasks for support staff was introduced at DG1. Formalities officers were called upon to perform tasks other than the treatment of patent application**

files. Search Assistance Services (known as SAS Units) were set up in DG1 and the complainant was assigned to SAS Unit 6.

In his staff report for 1992-93 the complainant obtained the overall rating "very good". Having been on sick leave from mid-December 1994 to mid-February 1995 he then worked part-time for a period of two months before resuming full-time work.

In a note of 24 July 1995 the manager of SAS 6 informed the complainant that he would need to increase his level of production. In October 1995 he was transferred, at his own request, to another SAS unit. In his staff report for the period from 1 January 1994 to 15 October 1995 his overall rating was "good". On 27 September 1996 he contested the report on the grounds that it did not take into account all the duties he had been performing, and in late October he requested a conciliation procedure.

As a result of that procedure his report was amended. The new version listed other duties he had carried out, including those of an examiner's clerk for a month in mid-1994. However, the ratings stayed the same. The President of the Office endorsed it on 20 March 1998. On 8 June the complainant wrote to the President asking him to review that decision or otherwise treat his letter as an internal appeal. He wanted the full range of his duties, including those deriving from diversification, to be taken into account in the evaluation of his work so that the "good" ratings could be upgraded to "very good". On 30 July 1998 the Director of Personnel Development told him that the President had referred his appeal to the Appeals Committee. In the absence of a decision on his internal appeal, the complainant is challenging the implied rejection of his claims.

B. The complainant contends that there were procedural flaws in the reporting process, and the amended report signed by the President "remains flawed and seriously deficient". There was delay in drawing up his initial report: under the relevant guidelines a report must be drawn up "immediately" when a staff member is transferred, but in his case the reporting officer waited until the end of the general reporting exercise for 1994-95. Consequently, he received his report nearly a year after his transfer had taken place. Furthermore, this officer did not give him the opportunity to review the duties he had performed while under his supervision.

He also contends that there were substantive errors. The report omitted essential facts concerning his activities. The reporting officer failed to assess the complainant's performance in the context of diversification and failed to take into account that during the reporting period he continued to "provide training and daily support" to other colleagues requiring assistance. Indeed, during the conciliation procedure the reporting officer denied that the complainant had been involved in training. He had a legitimate expectation that he would be fully appraised with regard to all aspects of his work. The report was further flawed because it made no mention of his sick leave and the fact that he had worked only part-time for a further two months.

The wording of a letter received from the President in March 1995 gave him a further legitimate expectation that his full contribution to diversification would be recognised. The President had said in the letter that staff members "willing to help out where there is a need within the team" were of value to the Office and he would consequently ask reporting officers and the Promotion Board to draw his "special attention" to such cases.

Lastly, the complainant claims that he suffered injury because of the delay in the conciliation and appeal proceedings. The conciliation procedure took nearly one year to complete. In addition, it has been more than fourteen months since he filed his appeal, and the Appeals Committee has not yet heard it.

He asks the Tribunal to: quash the President's decision of 20 March 1998; order that the contested report be referred back to both the reporting and countersigning officers to be fully revised; set a time limit of one month from the date of the present judgment for carrying out the revision; and order that the Promotion Board, on the basis of the revised report and in conformity with the President's promise, "recognise favourably" the full contribution he made "in the context of diversification". He also seeks awards of moral damages, firstly on account of the delays that occurred in producing the report and during the conciliation and internal appeal procedures, and secondly because of the "untruthful statements" made by the reporting officer in the report and during the conciliation procedure.

C. In its reply the Organisation objects to the receivability of the complaint. The complainant filed it before the Appeals Committee heard his case; so, the internal means of redress have not been exhausted. It rejects his claim about issuing an instruction to the Promotion Board as irreceivable since his internal appeal centred on his staff report and not on promotion.

Subsidiarily, on the merits, it says that the complaint is unfounded. There were no procedural flaws. The general guidelines on reporting contained in circular 188, in force during the reporting period were adhered to since they merely stipulated that, when a staff member is transferred, a separate report will be "drawn up"; that occurred in his case, even though he did not receive it until September 1996.

The Organisation produces an e-mail dated 13 January 2000 which indicates that in an interview with the complainant on 21 March 1994, held prior to issuing the 1992-93 staff report, his supervisor told him that the intensive staff training was over and that, because of a backlog of patent applications, the complainant was to revert to "production" work.

The EPO denies that there were substantive errors. In the period covered by the contested report the complainant would have given "simple advice" which cannot be likened to training. Although the matter of his sick leave was not mentioned explicitly in his report it was automatically taken into account in reckoning his output.

D. In his rejoinder the complainant submits that the facts contained in the e-mail of 13 January 2000 are "erroneous" and he disagrees with the Organisation's version of what was said during the interview of 21 March 1994.

In his opinion it was simply "untrue" to say that training was reduced to the level of "giving advice".

As for his claim regarding the Promotion Board, he stresses that he merely wishes the Board to review his performance in the context of diversification on the basis of an "accurate and complete" staff report.

E. In its surrejoinder the Organisation observes that the complainant paid no heed to the warning his reporting officer gave him on 21 March 1994. He is wrong to give the impression that there was a need for "massive on-the-job training" in 1994-95.

There was nothing out of the ordinary in the "delays" in the reporting process or in the conciliation and appeal procedures: the complainant suffered no particular disadvantage in comparison with other EPO staff. There was not a one-year delay in producing the report. The statutory interview with the complainant, prior to the issuing of the 1994-95 report, took place on 6 March 1996 and the reporting officer wrote his report on 10 April 1996. Moreover, delays arising from litigation about a report that is accurate cannot be considered as a valid ground for awarding damages.

## CONSIDERATIONS

1. The complainant, an employee of the European Patent Office, objects to a staff report in which he was given an overall rating of "good" for the period from 1 January 1994 to 15 October 1995, compared with "very good" for the preceding reporting period.

2. The complainant, who was transferred to another unit on 16 October 1995, received the report on 27 September 1996. It had been signed by the reporting officer on 10 April 1996 and by the countersigning officer on 19 June 1996.

3. On 23 October 1996 the complainant asked for conciliation proceedings, alleging both procedural and substantive errors in the disputed report. The first meeting, scheduled for 12 February 1997, was cancelled because of the inability of the countersigning officer to attend; so was the next. After five sessions, all of them held in 1997, the conciliation procedure ended on 17 October 1997 and resulted in the amendment of the report.

4. The President of the Office endorsed the amended 1994-95 report on 20 March 1998. On 8 June the complainant wrote to him expressing disagreement with that decision on the ground that the report was not an objective or "truthful" evaluation and inadequately covered some aspects of his performance. He pointed out the harm he had suffered because of the "unacceptable delays" in the conciliation procedure and accordingly asked

that it be referred back to the reporting officers for revision in line with the request he had made for the ratings to be upgraded. In the event of an unfavourable reply, he asked that his letter be considered as the lodging of an internal appeal under Articles 106 to 108 of the Service Regulations.

5. In a letter dated 30 July 1998, the Director of Personnel Development informed the complainant that the President of the Office could not grant his request and had referred his letter of 8 June 1998 to the Appeals Committee for an opinion.

6. On 30 September 1999 the complainant wrote to the Appeals Committee calling attention to the fact that fourteen months had lapsed since his appeal had been lodged and that he had not received any communication from either the Administration or the Committee. He concluded by stating that if he did not receive the position of the Administration within ten working days, he would address his complaint directly to the Tribunal.

7. Having heard no more from the Administration, on 18 October 1999 the complainant lodged this complaint with the Tribunal, asking inter alia: that the President's decision of 20 March 1998 be quashed; that the contested staff report be "referred back to the reporting and countersigning officers for a full revision in the light of the grounds, facts and evidence" that he had put forward; that he be awarded moral damages for the delays in drawing up his report and completing the conciliation procedure, and for the EPO's inaction on his internal appeal, as well as for the fact that he had "suffered from the untruthful statements made by the reporting officer".

8. The EPO submits that the complaint is irreceivable because of the failure of the complainant to exhaust the internal means of redress. Even before any action was taken by the Appeals Committee, to which his letter to the President dated 8 June 1998 was referred, the complainant appealed to the Tribunal, contrary to Article VII, paragraph 1, of its Statute which provides: "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

9. Regarding the complainant's contention that he filed the complaint with the Tribunal because of the excessive period of time that had elapsed, the Organisation justifies this delay on the ground of "the plethora of internal appeals" that the Appeals Committee had to deal with at that time.

10. Whether a delay is reasonable depends on the circumstances of each case (see Judgment 408, *in re* García and Márquez). Also, a complainant cannot sit back and do nothing when an appeal is lodged; he must pursue his appeal diligently (see Judgment 1970, *in re* White). In the present case, the complainant did nothing until he contacted the Appeals Committee on 30 September 1999 giving it ten days to send him a copy of the position of the Administration. He did not contact the EPO after that. In the circumstances, the Tribunal holds that the delay was reasonable and the complaint is premature.

The complainant appealed to the Tribunal before the Appeals Committee rendered its opinion. Therefore, there is no final decision for the complainant to impugn: no recommendation has been made by the Committee and no final decision has been taken by the President.

11. In light of the foregoing, there is no need to address the merits of the case.

## DECISION

For the above reasons,

The complaint is dismissed.

**In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

**MICHEL GENTOT**

Mella Carroll

**MELLA CARROLL**

Flerida Ruth P. Romero

**FLERIDA ROMERO**

**CATHERINE COMTET**

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

*Registry's translation,*
*the French text alone*
*being authoritative.*

# NINETIETH SESSION

***In re* Boivin (Nos. 3 and 4)** **Judgment No. 2034**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third and fourth complaints filed by Mr Philip Gustaaf Louise Boivin against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 3 October 1999 and corrected on 5 October 1999, the Agency's single reply of 14 January 2000, the complainant's rejoinder of 16 April and Eurocontrol's surrejoinder of 28 July 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out in Judgments 1768 (*in re* Bodar), 1870 (*in re* Boivin) and 1899 (*in re* Boivin No. 2) delivered on 9 July 1998, 8 July 1999 and 3 February 2000 respectively.

By a decision of 4 March 1996 the complainant's appointment to a post as an expert at the Agency's Institute of Air Navigation Services in Luxembourg was quashed, with effect from 31 August 1996, after another employee of the Agency, Mr Bodar, had challenged it. The complainant was then appointed to the post of "Head of the Accountancy and Personnel Office" of the Institute. Mr Bodar challenged that appointment too and the

Tribunal quashed the implied rejection of his internal complaint in Judgment 1768. In executing the judgment, Eurocontrol submitted Mr Bodar's internal complaint to the Joint Committee for Disputes, which, in its opinion of 26 August 1998 unanimously recommended cancelling Mr Boivin's appointment, in the absence of a reasoned report by the Selection Board, and resuming the procedure from the point at which it was flawed. Following that recommendation on the Director General's behalf, the Director of Human Resources cancelled Mr Boivin's appointment by a decision of 10 November 1998, with effect from 1 February 1999.

On 22 December 1998 a new Selection Board examined the files of applicants who were still interested in the post of Head of Accountancy and Personnel. It decided to make its choice on the strength of the files submitted in 1996 and not to count any qualifications or professional experience acquired since then. It found only one candidate suitable. It considered that in 1996 the complainant did not meet the requirement of a university diploma or equivalent experience and lacked enough experience in project accounting and personnel management. The Director of Human Resources notified the Board's conclusions to the complainant by telephone on 14 January 1999. He also informed him that, consequently, the Director General had decided to uphold the decision of 10 November 1998 and that his appointment would be terminated on 31 January 1999; however, because the Agency was "aware of its moral obligations" he invited the complainant to negotiate an amicable settlement. On 18 January 1999 the Director of Human Resources confirmed the decision of 10 November on the Director General's behalf and so informed the complainant by a letter of the same date.

On 25 January 1999 the complainant filed an internal complaint with the Director General challenging the decision of 10 November 1998 to cancel his appointment and the decision of 18 January 1999 dismissing him. He lodged a second internal complaint on 1 February against a decision of the Director General of 17 November 1998 to convene a new Selection Board. On 12 and 13 April 1999 he filed a third and a fourth internal complaint, which he said were linked, against the Selection

Board's decision of 22 December 1998 not to put him on the short list and the Director General's decision of 18 January 1999 to dismiss him.

In its opinion of 24 June 1999 on the first, third and fourth internal complaints, the Joint Committee for Disputes unanimously recommended rejecting his claim to the quashing of the decision of 10 November 1998 cancelling his appointment. As to his claim that there had been an obvious misappraisal of his abilities, the Committee considered that it was not in a position to give an opinion because it had not been given the necessary documents. It also found that the notice of dismissal given to the complainant was "unacceptable". By two letters of 2 July 1999 the Director of Human Resources rejected those three internal complaints on the Director General's behalf.

On 7 July 1999 the Committee unanimously found that the second internal complaint was irreceivable. On 17 August 1999 the Director of Human Resources wrote to the complainant on the Director General's behalf rejecting the internal complaint.

B. The complainant has four objections to the lawfulness of the decision of 10 November 1998 to cancel his appointment. The first plea is that there was an obvious misappraisal of the evidence since a substantiated report, in the form of an evaluation sheet on the candidates, was prepared and sent to the Director of Human Resources. He adds that consequently the impugned decision was not properly substantiated. Furthermore, the Agency acted in bad faith and failed in its duty to treat its staff with respect, because it did not let him have his say when the Joint Committee for Disputes was considering Mr Bodar's second internal complaint. Lastly, he considers that the Agency should have submitted the evaluation sheet to the Joint Committee for Disputes.

The complainant has three objections to the Selection Board's decision of 22 December 1998 not to put him on the short list and the Director General's decision of 18 January 1999 insofar as it was a decision "not to appoint [him] to the vacant post". First, he submits that the composition of the new Selection Board was unlawful: the membership was entirely new whereas it should have been as similar as possible to that of the first Board. Moreover, the new Board should have started the procedure again "at the point at which it was flawed", i.e. after the short list was drawn up, at the time when the reasoned report was to be drafted. The short list conferred rights on him and the Agency was wrong to change it. Secondly, he pleads inadequate substantiation or breach of his right to a fair process in that he was not informed of the membership of the new Board or its criteria for assessing candidates. Thirdly, he contends that he did have the necessary qualifications and the Board made an obvious error of judgment or disregarded the notice of competition, and overlooked his good performance in his post.

As to the decision of 18 January 1999 insofar as it terminates his appointment, the complainant alleges that it is unlawful on three counts. First, the Agency broke the Director General's promise – which was "confirmed" following Judgment 1768 – to reinstate him if his appointment was cancelled again. Secondly, the Agency had a duty not to cause him undue hardship and to protect him from any injury arising from the quashing of an appointment he accepted in good faith. The notice and the proposal to negotiate a settlement fell short of that duty. The Agency had a duty to reinstate him in another post or at least to keep him on temporarily. Lastly, he alleges abuse of authority by the Director of Human Resources, who wanted to dismiss him.

The complainant alleges very serious moral and material injury. He asks the Tribunal to quash the decisions of 2 July 1999 rejecting his internal complaints and to order his reinstatement in the Agency or, failing that, to order Eurocontrol to pay him 107,507,260 Luxembourg francs for the damage caused to his career, 500,000 francs – a provisional estimate – for direct material injury and 4,500,000 francs for moral injury. He also seeks 350,000 francs in costs.

C. In its reply the Agency rebuts the complainant's ten pleas. First, it maintains that the only document drawn up by the Selection Board was a list of suitable and unsuitable candidates. The evaluation sheet – prepared by the recruitment service – was no substitute for a reasoned report, so there was no such report. Secondly, the decision of 10 November 1998 was properly substantiated because it referred to Judgment 1768 and the opinion of the Joint Committee for Disputes. Thirdly, this Committee is free to decide whom it will hear. In all likelihood it found it unnecessary to hear the complainant because it found the procedural flaw so glaring. Fourthly, the evaluation sheet had been sent to the Committee, which found that it did not amount to a reasoned report.

Fifthly, Eurocontrol denies that it was bound to convene the same Selection Board. On the contrary, it appeared wiser not to have the same people. Moreover, the new Board was not bound by its predecessor's unsubstantiated ranking of candidates. Sixthly, nothing in the rules on competitions requires notification to candidates of a board's membership. The selection criteria are those set out in the notice of competition and the Board must abide by them. Seventhly, the Agency notes that the Board found that the complainant fell short of three criteria in the notice of competition.

Eighthly, the Agency denies that the Director General made any "promises". He simply gave an "undertaking" to take due account of the complainant's interests in settling the matter, which he did by inviting him to negotiate compensation for injury. But it could not break administrative rules in fulfilling that undertaking. Ninthly, Eurocontrol concedes that it must compensate the complainant for injury since he accepted his appointment in good faith. Lastly, on the complainant's tenth plea, it points out that there can be no presumption of abuse of authority and that the argument the complainant reasserts in this connection was rejected by the Tribunal in Judgment 1870.

Eurocontrol adds that the complainant's monetary claims are exorbitant and that reinstatement, even if the Tribunal orders it, depends on the availability of a suitable post. It asks the Tribunal to dismiss the complainant's claims and to award him material damages in proportion to the length of his appointment, to evaluate moral damages *ex aequo et bono* in accordance with the case law and to take account of its willingness to find an amicable settlement in any eventual awarding of costs.

D. In his rejoinder the complainant presses his pleas. He submits that a staff member is entitled to a hearing before any decision affecting him is taken. Citing the opinion of the Joint Committee for Disputes, he denies that the latter received the evaluation sheet. He expresses surprise that the

Selection Board comprised no members of the Institute for Air Navigation, since that was where the vacant post was. The Board found him wanting in "experience of personnel management", yet that was no longer one of the duties of the post, which shows that the Board did not know the requirements of the service. He accuses the Board of adding to the criteria set in the notice of competition. He maintains that his qualifications matched the requirements of the post better than those of the successful candidate. He contends that, taken together, all the facts show that there was abuse of authority. The Director General should have relieved the Director of Human Resources of his role in the matter.

The complainant adds thirteen pleas "taken from the various internal complaints" to those he put forward in this complaint.

In respect of the decision of 10 November 1998 to cancel his appointment to the vacant post, he pleads:

- an error of fact or of law in that the second cancellation of his appointment was the result of an improper dismissal in March 1996. His second appointment having been cancelled, he considers that he is no longer bound by his undertaking not to challenge the cancellation of his first appointment by the decision of 4 March 1996;
- breach of the rules on notice;
- an error of fact or of law in that the decision of 10 November 1998 is based on an alleged procedural flaw that Mr Bodar failed to bring up in his complaint to the Tribunal;
- abuse of authority.

In respect of the decision of 22 December 1998 not to put him on the short list and the decision of 18 January 1999 insofar as it does not appoint him to the vacant post, he pleads:

- an error of fact or of law, in that those decisions are the result of a wrongful dismissal in March 1996;
- an error of fact or of law in that these decisions are the result of the unlawful decision of 10 November 1998 to cancel his appointment;
- inadequate substantiation of the Board's report of 22 December 1998 and/or of the decision of 18 January 1999 not to appoint him to the vacant post, or breach of his right to a fair process;

- failure to take account of essential facts in that the Director General based his decision only on the Board's report of 22 December 1998, overlooking all other evidence relating to the complainant. The Director General was not bound by the Board's report and should have had serious doubts about its conclusions;
- abuse of authority;
- breach of the principle of legitimate trust, good faith and his right to a fair process.

Lastly, in respect of the decision of 18 January 1999 insofar as it dismisses him from the Agency, he pleads:

- an error of fact or of law in that the decision was the result of the unlawful decisions of 4 March 1996 and 10 November 1998 to cancel his appointments, that of 22 December 1998 not to put him on the short list and that of 18 January 1999 not to appoint him to the vacant post;
- breach of the rules on notice;
- breach of the principle of legitimate trust, and his right to a fair process, and of the duty to keep him informed; a flaw in the internal procedure in that he was confronted with a *fait accompli* before being given a say.

He increases his financial claims to a total of 177,866,453 Luxembourg francs.

E. In its surrejoinder Eurocontrol explains that the Director General took the view that a hearing of the complainant could have no influence on his decision by which he only drew the consequences of a fatal procedural flaw. It submits that there is no rule requiring the department with the vacancy to be represented on the Selection Board. It denies that the second Board added new criteria: it complied scrupulously with those set in the notice of competition. It concedes that were a number of formal flaws and irregularities but denies that they amount to abuse of authority.

Eurocontrol submits that the complainant is barred *ratione temporis* from challenging the cancellation of his first appointment. As to the notice period, it was lawful despite being short. It maintains that the Director

General was bound by the short list drawn up by the Selection Board: he may depart from the order of merit established by the Board but may not appoint a candidate not placed on the list.

Eurocontrol observes that to reinstate the complainant would be inappropriate because, among other reasons, it has completely lost confidence in him since he recorded a conversation he had with the Director of the Institute without the latter's knowledge. It informs the Tribunal that it will shortly make over to the complainant 120,000 euros in part payment of the 192,338.28 euros that it proposes for material damages.

## CONSIDERATIONS

1. On 6 September 1995 the complainant was appointed for five years from 1 September 1995 to a post as expert at the Institute of Air Navigation Services in Luxembourg. There was no notice of competition published for this post. Another staff member, Mr Bodar, challenged the appointment and the upshot was that the Agency cancelled it on 4 March 1996 with effect from 31 August 1996.

On 1 March 1996 the Agency published a notice of competition for the post of Head of the Accountancy and Personnel Office of the Institute. The complainant applied. He was put on the short list by the Selection Board, and on 28 May 1996 the selection Committee recommended his appointment. He was appointed to the post and took up his duties on 1 September 1996.

On 4 September 1996 Mr Bodar challenged the complainant's second appointment. The Tribunal set aside the implied rejection of his internal complaint (see Judgment 1768 *in re* Bodar) because the Joint Committee for Disputes was not consulted, and sent the case back to the Director General. The Joint Committee for Disputes considered the case and in its opinion of 26 August 1998 observed that the Selection Board had not submitted a substantiated report.

Endorsing the Committee's opinion on the Director General's behalf, on 10 November 1998 the Director of Human Resources cancelled the complainant's second appointment, with effect from 1 February 1999, on grounds of a procedural flaw.

A letter of 17 November 1998 confirmed that decision to the complainant and informed him that a Selection Board was to be convened to resume the procedure at the point at which it was flawed. By a letter of 27 November 1998 the complainant was told that all those who had applied in 1996 for the post of Head of the Accountancy and Personnel Office at Luxembourg were invited to reapply if they were still interested in the post. The complainant did so.

On 22 December 1998 the new Selection Board found him unsuitable for the post. He was informed on 14 January 1999 by telephone that the Director General had decided to endorse the Board's recommendation and not to appoint him, and confirmed his decision of 10 November 1998 cancelling his second appointment. The complainant would therefore cease to be an employee of the Agency as from 31 January 1999. The Director of Human Resources confirmed that in a letter of 18 January 1999, in which he also invited him to contact the Head of the Legal Department through his counsel in order to negotiate the financial and other consequences of his termination.

2. On 25 January 1999 the complainant filed an internal complaint against the decision of 10 November 1998 to cancel his second appointment, and the decision of 18 January 1999 not to re-employ him and to terminate his employment. He sought moral damages and material damages assessed on the basis of a full career at Eurocontrol.

In accordance with the recommendation made by the Joint Committee for Disputes on 24 June 1999, that complaint was rejected by a decision of 2 July 1999.

On 1 February 1999 the complainant lodged another internal complaint against the decision of 17 November 1998 to convene a new Selection Board to start the process again at the point at which it had been flawed. He sought compensation for the injury caused by the decision. That complaint was rejected as irreceivable on 17 August 1999 in accordance with the recommendation made by the Joint Committee for Disputes on 24 June 1999.

The complainant lodged two further internal complaints, both of which sought compensation: one on 12 April 1999 against the decision of 18 January 1999 not to appoint him and to dismiss him as from 31 January 1999, and the second on 13 April 1999 against the Selection Board's decision of 22 December 1998 not to put him on the short list, and against the decision of 18 January 1999.

By decisions of 2 July and 17 August 1999 all his internal complaints were rejected on the following grounds:

- his claims arising from the decision of 10 November were time-barred and so irreceivable;
- his claims arising from the Selection Board's decision of 22 December 1998 and the letter of 27 November 1998 inviting candidates to reapply were irreceivable because they were not decisions adversely affecting him but, respectively, an opinion and a preparatory act; they were also time-barred;
- the pleas in all his internal complaints were devoid of merit.

3. On 3 October 1999 the complainant came to the Tribunal asking it

> "Before ruling on the case: to order ... the hearing of witnesses ...
>
> ...
>
> In the first instance:
>
> - to quash the decision taken on 2 July 1999 by the Director of Human Resources on behalf of the Director General and by delegation, rejecting the complainant's internal complaint of 25 January 1999 against the decision of 10 November 1998 to quash the decision of 2 September 1996 to appoint him to the post of Head of the Accountancy and Personnel Office of the Institute of Air Navigation Services at Luxembourg, and the decision of 18 January 1999 not to reappoint him to that post but to terminate his employment with the Agency;
> - to quash all the decisions impugned in that internal complaint;
> - to quash the decision of 2 July 1999 rejecting the internal complaint of 12 April 1999 against the decision of 18 January 1999, and the internal complaint of 13 April 1999 against the Board's decision of 22 December 1998 not to put [him] on the short list, and the decision of 18 January 1999;
> - to quash all the decisions impugned in that internal complaint;
> - to order [his] reinstatement in another suitable post at the same level with duties that match his qualifications;

subsidiarily to this last claim:

- to order Eurocontrol to pay [him] 107,507,260 Luxembourg francs in compensation for the damage to his career, 500,000 Luxembourg francs as a provisional estimate of direct material injury, and 4,500,000 Luxembourg francs as compensation *ex aequo et bono* for moral injury.

In any event:

- to order Eurocontrol to pay him 350,000 Luxembourg francs in costs."

In his complaints the complainant puts forward ten pleas, which he increases to twenty-three in his rejoinder.

4. The Agency submits that the internal complaint of 1 February 1999 was irreceivable in that it was against a procedural measure – the letter of 17 November 1998 informing the complainant that a new Selection Board was to be convened. It adds that the arguments adduced in that complaint were developed at length in the three internal complaints against the cancellation of the complainant's appointment and his dismissal.

The complainant concedes that "all the pleas and claims he made in his internal complaint of 1 February 1999 ... are similar to those in the other complaints".

There is no need to determine the receivability of claims which, as the Agency acknowledges, form an indivisible whole relating to all the impugned measures.

5. Nor need the Tribunal go into the merits of each of the twenty-three pleas set out in B and D above. The gist of the complainant's case is that the Agency failed in its duty to treat its employees with respect, not to cause them unnecessary hardship and to protect them from any injury they might suffer from the quashing of an appointment accepted in good faith.

The Agency does not demur. It states in its submissions that it "does not claim that the way it treated the complainant is above reproach".

It adds that, the appointment of 1 September 1996 having proved to be doubly unlawful, Eurocontrol was not bound either to keep the complainant on in his post or to offer him another one in breach of its rules on the filling of vacancies; it acknowledges that it must however, compensate him for the injury he suffered, since he accepted his appointment in good faith.

6. As the Tribunal already observed in its previous judgments on the disputes between the two parties, the complainant accepted the appointment in good faith and so was entitled to redress for the Agency's administrative mistakes. There is no doubt but that the cancellation of his appointments and his subsequent dismissal are a direct result of procedural flaws for which the Administration was originally responsible.

7. On each occasion the Agency had to resume the recruitment process for the post in question following the quashing of the appointment. But on this last occasion the procedure showed none of the flaws alleged by the complainant. So there are no grounds for his claims to the quashing of the decision to cancel his appointment, or the decision not to put him on the short list, or the decision not to appoint him to the vacant post, or the decision to terminate his employment. However, by rejecting his claims the Agency did fail in its duty to treat him with respect and to protect him from the injury caused by the quashing of an appointment he accepted in good faith. To that extent, the decisions to reject his internal complaints must be set aside.

8. It is plain on the evidence that although the parties concur on the need for redress, they have been unable to reach agreement on its nature or on the amount of any award of damages.

9. The complainant considers that the gravity of the Agency's mistakes entitles him to full redress in the form either of reinstatement or of compensation.

10. He asks the Tribunal to order his reinstatement in another suitable post at the same level, with duties that match his qualifications.

He submits that he is not asking the impossible since he is well-qualified, has always discharged his duties satisfactorily and there should be no shortage of suitable posts in an organisation as large as Eurocontrol.

He denies that reinstatement is inappropriate: even if he and the Director of Human Resources have their obvious differences, he has always had excellent relations with the Agency's management and staff.

Eurocontrol replies that reinstatement presupposes the availability of a suitable post. It points out that, Eurocontrol being essentially a technical organisation, grade A administrative posts, which are specific in nature, are rare, particularly since the staff budget was frozen and existing staff were assigned to the most essential tasks.

Moreover, in view of the complainant's disputes with the Agency and his personal accusations against other officials, Eurocontrol is highly sceptical about the possibility of his "performing harmoniously and in a climate of calm" any new duties it might find for him.

Lastly, the Agency points out that it has lost all confidence in him.

11. The Tribunal has consistently held that reinstatement is subject to two conditions. First, there must be a vacant post and, secondly, the staff member must be qualified for it. The circumstances of the case and the evidence indicate that those conditions are not fulfilled here. But, more importantly, reinstatement is inadvisable when an employer has valid reasons for losing confidence in an employee. And Eurocontrol has.

It is common ground that the complainant recorded and transcribed a conversation he had with the Director of the Institute without the latter's knowledge. Even if he did so in an attempt to support his case, such behaviour is unacceptable and fully warrants the Agency's loss of confidence. That being so, reinstatement is not advisable.

12. The complainant makes subsidiary claims to moral and material damages.

He explains that the moral injury arises from the humiliation he feels at having been declared unfit to perform his duties, the frustration he suffered at having two consecutive appointments cancelled on account of procedural flaws, and the serious damage to his career, and from worry about the repercussions of the serious material injury for himself and his family.

The Agency concedes moral injury but attempts to attenuate its extent by asking the Tribunal to take account of certain facts which show that it acted in good faith and is well disposed towards the complainant. It cites in particular the letter of 16 May 2000 offering him 25,000 euros, the fact that it has decided to make over 120,000 euros in part payment of material damages without awaiting the Tribunal's judgment in early 2001; and its decision not to deduct from the material damages the amounts granted him for unemployment or any income he may have earned from other sources.

13. The Tribunal observes that the Agency has demonstrated its goodwill and positive attitude. But that does not mitigate the obvious gravity of the undeniable moral injury it caused the complainant and for which it must compensate him. Fair redress for that injury amounts to more than the sum it proposed.

14. By way of material damages the complainant seeks compensation for the injury caused directly by all the inconvenience he suffered as a result of having to move from Luxembourg to Belgium, including any costs he may incur in breaking his lease in Luxembourg and moving his possessions to Belgium. He also claims compensation for the injury to his career amounting to the difference between, on the one hand, the amount, after tax and deduction of social security charges, of all the components of the income (remuneration, allowances, benefits in kind, pension, etc.) he would have received as from 1 February 1999 had he stayed at Eurocontrol and, on the other, the amount, after tax and deduction of social security charges, of his income since 1 February 1999, his current earnings in the job he has held in the Belgian private sector since 1 September 1999, or any future income from a job outside the Agency.

15. In direct material damages the complainant provisionally claims 500,000 Luxembourg francs. For the damage to his career he claims 107,507,260 francs. In fact, his main claim was that he had the right to the renewal of his original fixed-term appointment and its conversion to a permanent one within the meaning of the Staff Regulations, or at least an indefinite appointment, in accordance with the promises he had received and with Eurocontrol's general policy. In a subsidiary claim he also

observes that he could legitimately expect at least a renewal of his appointment given the promises made to him and the Agency's general policy.

While denying the complainant's allegations the Agency acknowledges that it recruited him for five years and told him on his arrival that he could reasonably expect his appointment to be renewed. But, it says, no competent authority gave him formal assurances that it would be renewed and even less that it would be converted to a permanent one.

In rebuttal the complainant relies on promises which he alleges were made by the appointing authority and he cites a statement of 22 July1998 by a former Director of the Institute who held office from June 1991 to May 1996. It says:

> "After Mr Boivin's refusal [the appointing authority] confirmed the following terms:
>
> - initial offer of a five-year contract, renewable;
> - if the contract is renewed, it will be converted to a permanent contract within the meaning of the Staff Regulations in force at the time of GMD No. 5/95;
> - entitlement to renewal is subject to the following conditions:
>     - the work performed must not have the form of a project, i.e. having a precise beginning and end;
>     - the duties involved must be performed satisfactorily;
>
> Mr Boivin's duties, by their nature, have been recognised as continuous; having received confirmation of the above conditions and the Director General's decision (GMD No. 5/95), Mr Boivin has reconsidered his decision and has accepted the offer of employment on that basis and under those conditions."

16. The Tribunal observes that, even if he was given promises at the time of his first appointment, which was cancelled because of a procedural flaw, the complainant has failed to produce formal proof that they were made by a competent authority and were therefore enforceable. The former Director of the Institute whose statement he produces did not have the authority to enter into formal commitments beyond the initial one. Responsibility for Eurocontrol's employment policy was not his but solely that of the Director General. In any case, he was to leave the office in May 1996.

17. As already stated, the complainant fails to prove that he was to be given a permanent appointment or that the competent authority assured him at any stage that his appointment would be renewed and subsequently converted into a permanent one. However, there are several indications in the evidence on file that he had reason to believe that he had a legitimate expectation that his initial appointment would be renewed on its expiry, and that since the Agency had no quarrel with his performance his contract would in all likelihood have been renewed for at least five years in accordance with the Agency's practice had his successive appointments not been tainted with procedural flaws. On this point the case law holds that a decision not to renew a fixed-term contract does not interfere with any contractual right but merely disappoints expectation of further employment. The conclusion is that it was possible for the Director General, for one reason or another, not to renew the complainant's contract beyond the initial period without impairing any of his contractual rights.

Accordingly, the Tribunal considers that the compensation he should receive instead of reinstatement should comprise, in addition to the amounts awarded for moral damages and direct material damages, an amount equivalent to what he would have earned up until the end of his initial contract had it not been cancelled and an amount in compensation for the injury caused by the loss of a legitimate expectation of continued employment at Eurocontrol.

18. The exact amount of such redress being impossible to determine, in accordance with its case law the Tribunal will award the complainant by way of damages under all heads of injury an amount set *ex aequo et bono* which shall take account of the sums he has already been paid as a result of the early termination of his contract.

The Tribunal considers 220,000 euros to be a fair award. The 120,000 euros that the Agency proposed to make over pending the establishment of damages shall be deducted from the 220,000 euros if they have already been paid.

19. The Tribunal deems the hearing of witnesses unnecessary.

20. Since his claims largely succeed, the complainant is entitled to 3,000 euros in costs.

## DECISION

For the above reasons,

1. The impugned decisions are set aside insofar as they reject the complainant's claims for damages.
2. The Agency shall pay the complainant by way of damages for injury under all heads the amount of 220,000 euros minus 120,000 euros, if they have already been paid, as stated under 18 above.
3. The Agency shall pay him 3,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

**Organisation internationale du Travail** **International Labour Organization**
***Tribunal administratif*** ***Administrative Tribunal***

*Registry's translation,*
*the French text alone*
*being authoritative.*

# NINETIETH SESSION

***In re* Boivin (No. 5)** **Judgment No. 2035**

**THE ADMINISTRATIVE TRIBUNAL,**

Considering the fifth complaint filed by Mr Philip Gustaaf Louise Boivin against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 8 November 1999 and corrected on 26 November 1999, Eurocontrol's reply of 3 March 2000, the complainant's rejoinder of 26 May and the Agency's surrejoinder submitted on 11 August 2000 together with observations sent by Mrs B. at the Tribunal's request;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 15 May 1998 Eurocontrol published a notice of competition for a post as "expert – financial analyst" in the Finance Directorate. It bore the reference HQ-98-AA/044. The complainant applied for the post as an internal candidate on 11 June. Previously, his appointment as an expert at the Agency's Institute of Air Navigation Services in Luxembourg had been cancelled as from 31 August 1996 and a subsequent appointment as Head of the Accountancy and Personnel Office of the Institute had been challenged (see Judgments 1768, *in re* Bodar, of 9 July 1998 and 2034, *in re* Boivin Nos. 3 and 4 delivered this day). The Selection Board put him on the short list on 16 September. On 25 September he underwent aptitude and personality tests, as a result of which he was ranked in the second group. Only one applicant, Mrs B., an external candidate, was ranked in the first group. On 7 December four members of the Finance Directorate, including the Director, interviewed the complainant. In their report of 15 December they recommended not appointing him. By a letter of 23 December 1998 the complainant was told that another candidate – Mrs B. – had been selected.

Meanwhile, his appointment as Head of the Accountancy and Personnel Office had been quashed by a decision of 10 November 1998 as from 1 February 1999, and on 22 December 1998 a new Selection Board had found him unfit for the post. On 14 January 1999 he was told that his employment at Eurocontrol would end as from 31 January 1999.

On 16 March 1999 the complainant filed an internal complaint with the Director General against the decision of 23 December 1998 rejecting his application. In its opinion of 5 August 1999 the Joint Committee for Disputes recommended rejecting the complaint. By a letter of 9 August 1999, the impugned decision, the Director of Human Resources on the Director General's behalf, endorsed the recommendation but invited the complainant to negotiate a settlement.

B. The complainant contends that the decisions of 23 December 1998 and 9 August 1999 were not properly reasoned. In his submission, the interview board went back on the decision of the Selection Board, which found him suitable. Furthermore, the letter of 23 December said that the "interview board's final decision fell on the candidate whose profile was best suited to the requirements". But such a decision lies with the Director General, not with the interview board. He asserts that the board disregarded the criteria in the notice of competition and made an obvious error of judgment about his qualifications. According to the Staff Regulations governing officials of the Eurocontrol Agency, the Agency must first look for a qualified candidate among its own staff or in national administrations before opening up the competition to external candidates. The Agency was bound to reinstate him, not only to protect him from the injury caused by the quashing of an appointment he had accepted in good faith but also because of a "promise" made by the Director General. But that duty, and the Agency's liability in the cancellation of his previous appointment have not been taken into account. As in his third and fourth complaints (Judgment 2034), he accuses the Director of Human Resources of abuse of authority. Lastly, the Agency acted in breach of good faith by denying him a say before it rejected his application.

The complainant considers that he was entitled to a "full career" at Eurocontrol and has therefore suffered very serious moral and material injury. He seeks "compensation for all injury of all kinds and from all sources, be it past, present or future, known or as yet unknown, arising from the rejection of [his] application ... and the subsequent termination of [his] career and the various consequences and situations that it ... will cause". More specifically, he claims: the quashing of the impugned decision; reinstatement in the post of financial analyst or another post provided that it is "acceptable to him"; payment of the "salary he would have received ... plus interest on arrears" without deduction of any income earned elsewhere, and an award of 4,500,000 Luxembourg francs in moral damages and of 500,000 francs in "direct material damages". Failing reinstatement he claims 107,507,260 francs for the damage to his career and 640,000 francs "for the loss of social security coverage more advantageous than the national scheme". He also claims 250,000 francs in costs.

C. Eurocontrol replies that it did give proper reasons for the decision of 23 December 1998. The interview board did not contradict the Selection Board's findings but refined its assessment of the complainant. The Agency concedes that the letter of 23 December was inappropriately worded but points out that "the Director General did sign" the letter of appointment, of which it produces a copy. It denies that the interview board made an obvious error of judgment or added to the selection criteria and points out that internal candidates are given preference only if they are as well qualified as external ones. The results of the complainant's tests were less good and the interview had revealed serious shortcomings. Eurocontrol acknowledges that it was bound to look for another post for the complainant following the cancellation of his first appointment, but not to the detriment of its own interests. It denies abuse of authority and breach of good faith.

Noting that the complainant's monetary claims are related to his third and fourth complaints and not the present one, Eurocontrol responds with the same arguments as it put forward in Judgment 2034.

D. In his rejoinder the complainant contends that, in view of the position he was in, Eurocontrol ought to have taken particular care in substantiating its decision. He accuses the Agency of inconsistency: it is now attempting to minimise the importance of the Selection Board's findings yet it took them as the basis for its decision to cancel his appointment to the post he held at the Institute. He presses his plea that the interview board's conclusions contradicted those of the Selection Board and asserts that he had no difficulty in answering the few technical questions put to him at the interview. He observes that his application for another post was also rejected. He asserts that the Joint Committee for Disputes failed to examine all the pleas he made in his internal complaint.

The complainant increases his monetary claims to a total amount of 118,266,453 Luxembourg francs.

E. In its surrejoinder the Agency submits that the complainant may not challenge any decisions subsequent to the filing of his complaint, such as the rejection of his application to another post. It observes that the Joint Committee for Disputes, which is an advisory not a judicial body, noted that it had already dealt with many of the complainant's arguments in the context of earlier internal complaints.

F. In her observations Mrs B. states that she accepted the appointment in good faith and asks to be protected from any injury if Mr Boivin's complaint succeeds.

## CONSIDERATIONS

1. Facts relevant to the disputes between the parties are to be found in Judgments 1768 (*in re* Bodar), 1870 (*in re* Boivin) and 1899 (*in re* Boivin No. 2) and in Judgment 2034, delivered this day, in which the Tribunal ruled on Mr Boivin's third and fourth complaints.

The salient points are as follows. The complainant was appointed to a post as expert at the Institute of Air Navigation Services in Luxembourg. That appointment was quashed having been challenged by another staff member. His second appointment, as Head of the Accountancy and Personnel Office having also been challenged, the complainant applied on 11 June 1998 for a post as "expert – financial analyst" in the Finance Directorate.

On 21 September 1998 he was informed that, on the strength of his professional qualifications and experience, the Selection Board had put him on the short list at its meeting of 16 September.

On 25 September he attended an assessment session, which was the next phase of the competition and consisted of a number of tests, which he passed. He was accordingly invited to take part in the final phase of the selection procedure: an interview carried out by a board comprising four members of the Finance Directorate, including the Director. The interview took place on 7 December 1998.

On 23 December the complainant was informed that in its report, which it had drawn up on 15 December following the last phase of the competition, the interview board recommended appointing not the complainant but another candidate – Mrs B. – "whose profile was best suited to the requirements".

That decision came after the one of 10 November 1998 to cancel the complainant's appointment as Head of the Accounting and Personnel Office on grounds of a procedural flaw, and after the Selection Board's decision of 22 December 1998 not to put him on the short list for that post (see Judgment 2034).

2. On 16 March 1999 the complainant lodged an internal complaint against the rejection of his application for the post of financial analyst. In its opinion of 5 August 1999 the Joint Committee for Disputes recommended rejecting the complaint. The Director of Human Resources endorsed the recommendation on the Director General's behalf and so informed the complainant in a letter of 9 August 1999.

That is the decision that the complainant is now impugning in this complaint lodged on 8 November 1999.

3. He asks the Tribunal, among other things:

> "Before ruling: to order … the hearing of witnesses …
>
> In the first instance:
>
> … to award him compensation for all injury of all kinds and from all sources, be it past, present or future, known or as yet unknown, arising from the rejection of [his] application … for the post of financial analyst and the subsequent termination of [his] career and the various consequences and situations that it … will cause."

The Tribunal need not entertain all eight of the complainant's pleas. It will examine only those that are material to the purpose of this complaint, which is to challenge the rejection of his application for the post of financial analyst.

As the Agency rightly points out, the complainant may not impugn in the present proceedings any decisions taken since he filed his complaint.

4. The complainant submits that the Agency was in breach of Article 25 of the Staff Regulations because the decisions to turn down his application and to reject his internal complaint were not properly substantiated as that Article requires. He refers, in particular, to the second paragraph which reads as follows:

> "Any decision relating to a specific individual which is taken under the Staff Regulations shall at once be communicated in writing to the official concerned. Any decision adversely affecting an official shall state the reasons on which it is based."

Eurocontrol replies that it based its decision to turn down his application on valid reasons, that there were documents such as the reports of the selection and interview boards giving more detailed explanation and that, in any event, the subsequent internal complaint and the reply of 9 August 1999 gave it the opportunity to enlarge on the initial reasons.

According to the case law, when the result of a competition is announced and, more broadly when, as here, a choice is made between candidates the reasons for the choice need not be notified at the same time as the decision (see Judgment 1787, *in re* Gramegna, under 5).

The conclusion is that all the relevant information was given to the complainant later. Before coming to the Tribunal he had full particulars of the results of the competition. His plea of inadequate substantiation therefore fails.

5. He further pleads that the Agency acted in breach of Article 30(2) of the Staff Regulations and Articles 5 and 7 of Rule of Application No. 2 in that the interview board contradicted the Selection Board's decision that the complainant fulfilled the requirements of the notice of competition. The plea is devoid of substance. There is no evidence that the interview board disregarded the Selection Board's decision regarding the short list. The interview board was set up pursuant to the first paragraph of Article 7 of Rule No. 2 which says:

> "The Director General shall select from this list the person(s) he appoints to the vacant post(s). The selection shall be made in the light of a reasoned opinion, based on assessment interviews, provided by the unit concerned."

The interview board merely selected the successful candidate from the short list established after the preliminary phases by the Selection Board, and did not call into question the latter's conclusions.

6. The complainant submits that there was an obvious error of judgment in that his qualifications did indeed meet the requirements in the notice of competition.

The plea fails. There is no evidence that the interview board made a clear mistake of assessment. Its job was to facilitate selection of the successful candidate by carrying out direct interviews and thus refining and completing the information gleaned from the examination of the selected candidates' qualifications, taking into account the general criteria set in the notice of competition and the results of their tests.

Nor does the complainant prove that the interview board added criteria which were not in the notice of competition.

7. The complainant alleges that by appointing an external candidate in preference to an internal one the Agency infringed Articles 30 and 31 of the Staff Regulations.

Those articles read as follows:

> "Article 30
>
> 1. Before filling a vacant post, the Director General shall inform the Agency staff and the States party to the EUROCONTROL Convention.
>
> The selection of candidates shall be based on qualifications or, for certain posts provided for in Article 28, paragraph d), on examination or on

> qualifications and examination in accordance with the conditions laid down in paragraph 2 below.
>
> 2. For each competition, a selection board shall be appointed by the Director General. This Board shall draw up a list of suitable candidates, in order of merit and without distinction of nationality.
>
>    The Director General shall decide which of these candidates to appoint to the vacant posts.
>
>    In the event of a selection being made which is not in conformity with the list drawn up by the selection board, reasons for the appointment shall be given in consequence.
>
> 3. The procedure laid down in paragraphs 1 and 2 above may also be adopted with a view to constituting a reserve for future recruitment.
>
> Article 31
>
> In the event of the application of the provisions of Article 30 above not enabling the Agency to obtain a sufficient number of qualified staff to fill its needs, it may proceed to direct recruitment by means of competitions, selection being made according to a procedure similar to that described in Article 30.
>
> For posts in Category C and the Language Service, recruitment may be made directly without prior notification of the States parties to the Convention."

The Tribunal finds no breach of those articles. There is nothing to prevent Eurocontrol from recruiting directly by means of a competition open to both internal and external candidates. And even if Articles 30 and 31 do establish a preference for internal applicants, it comes into play only in the event of the candidates being equally qualified, bearing in mind that according to Article 27 of the Staff Regulations "Recruitment shall be directed to securing for the Agency services of officials of the highest standard of ability, efficiency and integrity ...". Furthermore, the Agency's observations show that it did take account of the complainant's specific position.

The plea therefore fails.

8. The complainant contends that the Agency used the procedure for filling the post of financial analyst for unlawful purposes, namely to exclude him from the management of the Agency which, he says, amounts to an abuse of authority.

The Agency rightly points out that abuse of authority may not be presumed but must be borne out by relevant and clear evidence that the impugned decision was taken for purposes other than the ones stated.

The process for filling the post of financial analyst was proper and fair to all candidates including the complainant. Furthermore, it is plain on the evidence that the only reason for not appointing the complainant was the interview board's negative opinion of him. Since the complainant offers not a shred of evidence to support his allegation of abuse of authority, the plea fails.

9. The complainant pleads breach of the rules of good faith and the duty of international organisations to treat their staff with respect, in that he was confronted with a *fait accompli* in which he had had no say.

He submits that the decision not to appoint him to the post of financial analyst was detrimental to his rights and legitimate interests because the rejection of his application led to his dismissal. The Agency therefore ought to have informed him "that it had no intention of appointing" him and also to have allowed him to express his views and defend his interests in the context of the appointment procedure before he was dismissed. Instead it confronted him with a *fait accompli*.

The Tribunal observes that the complainant is merging the present issue with his dismissal following the quashing of his earlier appointments on grounds of procedural flaws, whereas the purpose of this complaint is to challenge the decision to reject his application for the post of financial analyst that was to be filled by way of competition.

As the Tribunal stated above, it may not entertain pleas which are immaterial to the complaint under examination.

As to the competition process for the post of financial analyst, nothing in the evidence suggests that the complainant was treated differently from the other candidates. He was properly informed of the results of the examination of his qualifications, tests and interview. He was eliminated at the last stage of the competition because of the interview board's assessment of his performance. There is no evidence that at any stage of the competition process the Agency acted in breach of good faith or of its obligation to treat him with respect. The plea therefore fails.

10. The complainant alleges an error of law or of fact in the consideration of his internal complaint by the Joint Committee for Disputes and the decision to reject it.

He submits that not all the pleas put forward in his internal complaint were considered and it is not clear whether the Committee examined his arguments in accordance with the adversarial principle.

The plea cannot succeed. The Joint Committee for Disputes is not a judicial body but an advisory body whose opinions are not binding on the Director General, as stated in Article 1 of the annex to service note No. 6/95 of 1 March 1995 creating the Joint Committee for Disputes.

Furthermore, the principle of adversarial proceedings was observed: in his internal complaint and related submissions the complainant was able to put forward his views to the Committee; and he has had ample opportunity to enlarge on them in his complaint to the Tribunal.

The plea therefore fails.

11. For the above reasons, the Tribunal cannot allow his plea that the Agency committed an error of law or overlooked essential facts by not taking account of the need to reinstate him.

His arguments on that score are not relevant to the purpose of this complaint.

12. It follows that the complaint must be dismissed, there being no need for a hearing of witnesses.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

*Registry's translation,*
*the French text alone*
*being authoritative.*

# NINETIETH SESSION

**Judgment No. 2036**

***In re* Cervantes (No. 7),**
**De Lucia (No. 2), Kagermeier (No. 6),**
**Luckett (No. 4) and Munnix (No. 3)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr Jean-Pierre Cervantes, the second complaint by Mr Gennaro De Lucia, the sixth complaint by Mrs Ingrid Kagermeier, the fourth complaint by Mr Paul Luckett and the third complaint by Mr Serge Munnix against the European Patent Organisation (EPO) on 14 March 1999, the EPO's reply of 27 May, the complainants' rejoinder of 30 July and the Organisation's surrejoinder of 30 September 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article 38(3) of the Service Regulations for Permanent Employees of the European Patent Office, secretariat of the EPO, reads as follows:

> "The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

> - any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions;
> - any question of a general nature submitted to it by the President of the Office;
> - any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36."

Paragraph 1 of Article 7, concerning recruitment procedure, provides in particular that:

> "Recruitment shall generally be by way of competition ...
>
> A procedure other than that of competition may be adopted by the appointing authority for the recruitment of the senior employees [that is, employees appointed by the Administrative Council] referred to in Article 11 of the European Patent Convention ..."

The complainants are all permanent employees of the Office. At the time of the impugned decision, they were members of the Staff Committee and of the General Advisory Committee.

From 1977 to 1995 recruitment of the Vice-Presidents of the Office was carried out informally: the heads of the national delegations constituting the Administrative Council made recommendations, and the appointments were subsequently formalised by the Council. Vice-Presidents used also to be permanent employees of the Office. However, as the number of Contracting States to the European Patent Convention grew and Vice-Presidents acquired more political functions, the EPO decided to recruit them on a contractual basis. Thus the Administrative Council, at its 62nd Session held from 12 to 14 June 1996, approved a "Specimen contract concerning the appointment and terms of employment of Vice-Presidents", and amended Article 1(5) of the Service Regulations, which now reads:

> "These Service Regulations shall apply to the President and Vice-Presidents of the Office only in so far as there is express provision to that effect in their contract of employment."

On 5 December 1996 at its 65th Session, the Administrative Council adopted the "Guidelines for the recruitment procedure for Vice-Presidents of the European Patent Office" by decision CA/D 14/96.

On 27 February 1997 the complainants each submitted an appeal to the Chairman of the Administrative Council contesting the procedure whereby that decision was adopted. They objected to the fact that the General Advisory Committee had not been consulted. In a letter of 4 April 1997 the Chairman informed the complainants that their appeals had failed and that the matter had been referred to the Appeals Committee of the Administrative Council. In its report of 10 November 1998 the Committee declared the appeals irreceivable because they were directed against a "legislative act", and recommended dismissal. At its 73rd Session, from 8 to 10 December, the Administrative Council unanimously decided to dismiss the appeals. Its Chairman so informed the complainants in a letter of 11 December 1998. That is the impugned decision.

B. The complainants contend that their complaints are receivable, in particular since they impugn within the time limits a decision adversely affecting them.

On the merits they submit that the only issue to be resolved is whether the Council was bound to consult the General Advisory Committee in accordance with Article 38(3) of the Service Regulations. They allege that the general provisions of the Service Regulations apply even if the contract for Vice-Presidents makes no reference to them. Since the preamble to decision CA/D 14/96 refers to Article 7 of the Service Regulations, the Administrative Council obviously considers that this general provision applies to the recruitment procedure for Vice Presidents even if the contract does not mention it. Accordingly, say the complainants, so too does Article 38 of the Service Regulations. Furthermore, decision CA/D 14/96 is a general one applying to a category of personnel, Vice-Presidents, whose terms of employment are at least partly governed by the Service Regulations. The Council was therefore bound to consult the General Advisory Committee. Its failure to do so constituted a serious procedural flaw.

The complainants claim the quashing of Administrative Council decision CA/D 14/96 concerning the recruitment procedure for Vice-Presidents, and 1,000 German marks in moral damages for every month the Council refuses to withdraw its decision. They claim 5,000 marks in costs.

C. In its reply the EPO contends that the complaints are irreceivable. It asserts that Article 38(3) of the Service Regulations is immaterial. Article 11(2) of the Convention, which takes precedence over the Service Regulations, gives the Administrative Council "sole competence" for the appointment of Vice-Presidents, the President of the Office being merely consulted. The latter therefore holds no right to make proposals, which implies that he will not consult the General Advisory Committee "in the absence of matters to place before it or for which it is directly competent".

Article 7(1) of the Service Regulations allows the Administrative Council "full freedom" in setting the procedure for the recruitment of senior employees. Moreover, under Article 33(2)(e) of the Convention, the Council may set and amend its own Rules of Procedure; and it did just that when it adopted the Guidelines for the recruitment of Vice-Presidents. It would therefore be "extraordinary" to allow staff representatives a say in the organisation of the Council's work. Furthermore, the offending adoption procedure coming under Article 33 of the Convention, its review is outside the competence *ratione materiae* of the Tribunal, which may rule on non-observance only of the Service Regulations.

The specimen contract excludes application of Article 38 of the Service Regulations by implication, in that it does not expressly include it. That is a consequence of the "highly political" nature of the duties of a Vice-President. There is no substance to the argument that there are general provisions which apply even if no mention is made of them in the contract. The EPO points out that it amended Article 1(5) of the Service Regulations and adopted the specimen contract in June 1996, and that the complainants did not object at the time, not even to the fact that the contract excluded application of Article 38. The non-application of that article was thus confirmed before the Guidelines for the recruitment of Vice-Presidents were adopted in December 1996.

In subsidiary argument the EPO points out that to claim the quashing of the decision to adopt the Guidelines on grounds of serious procedural flaws is excessive given that the complainants have no quarrel with their substance.

D. The complainants rejoin that Article 11(2) of the Convention does not release the Council from the obligation to consult the General Advisory Committee. When appointing senior employees, the Council is free to choose the person and the procedure it likes. However, once it has decided on a recruitment procedure, the latter comes within the ambit of Article 38(3) of the Service Regulations.

E. In its surrejoinder the Organisation argues that, even supposing that Article 38 did apply, none of the instances in which consultation of the General Advisory Committee is mandatory would be relevant in this case.

## CONSIDERATIONS

1. Under Article 11(2) of the European Patent Convention (hereinafter referred to as "the Convention"): "The Vice-Presidents shall be appointed by decision of the Administrative Council after the President has been consulted." No consultation is required for the appointment of the President, which is also the responsibility of the Administrative Council (Article 11(1) of the Convention), as is the appointment of the members of the Boards of Appeal and of the Enlarged Board of Appeal – made on a proposal from the President (Article 11(3) of the Convention). The President is the appointing authority for other employees.

The Service Regulations for Permanent Employees, adopted by the Administrative Council, includes the following provisions:

> "**Article 1**
> **Field of application**
>
> ...
>
> (5) These Service Regulations shall apply to the President and Vice-Presidents of the Office only in so far as there is express provision to that effect in their contract of employment.
>
> [Version adopted by decision of the Administrative Council CA/D 6/96 with effect from 14 June 1996.]
>
> ...

**Article 7**

**Recruitment procedure**

**[see text under A above]**

**...**

**Article 38**

**Joint Committees**

**(1) The joint committees shall consist of:**

**- a General Advisory Committee,**

**- Local Advisory Committees.**

**(2) [composition of joint committees]**

**(3) [see text under A above]"**

**Furthermore, by the terms of Article 33(2)(e) of the Convention the Administrative Council establishes its own Rules of Procedure.**

**At its 65th Session, held from 3 to 5 December 1996, the Administrative Council adopted Guidelines for the recruitment procedure for Vice-Presidents of the Office. It did not consult the General Advisory Committee before doing so.**

**Until then, there had been no written rules governing the procedure to be followed in appointing a Vice-President.**

**2. The complainants, who at the material time were members of the Staff Committee and of the General Advisory Committee, filed an unsuccessful appeal claiming that before the adoption of such a rule, the General Advisory Committee should be consulted on what was a "proposal which concerns ... part of the staff to whom these Service Regulations apply", in accordance with Article 38(3) of the Service Regulations.**

**On the proposal of its Appeals Committee, the Council rejected their internal appeal by a decision which they are now challenging before the Tribunal.**

**3. The complainants contend that the absence of consultation with the General Advisory Committee constitutes a procedural flaw which taints the Council's initial decision. They argue that Vice-Presidents are members of staff and as such are subject in part to the Service Regulations and in any event to Article 7, which governs recruitment and is referred to in the Council's decision to adopt the offending Guidelines. In their**

view, consultation of the General Advisory Committee in no way impairs the Council's power of decision, and the procedure for adopting the Guidelines therefore fell within the ambit of Article 38(3) of the Service Regulations.

The Organisation submits that the complaints are irreceivable and, subsidiarily, devoid of merit. It bases its objection to receivability on the Council's exclusive competence. This, it argues, is established by Article 11 of the Convention, which regulates the consultation procedure exhaustively, providing for consultation only of the President. Since the latter makes no proposals but is merely "consulted", it is inconceivable that an advisory body would be required to submit opinions to him. Being a higher-ranking norm, the Convention would take precedence over any rule to the contrary in the Service Regulations. Besides, Article 7(1) of the Service Regulations also gives the Council sole competence to set rules for the procedure for recruiting senior employees. The Council's exclusive competence for all aspects of the procedure is also established by Article 33(2)(e) of the Convention which empowers it to set its own Rules of Procedure, of which the Guidelines are but an instance. They were not adopted under the Service Regulations, so the case is not within the Tribunal's competence as defined in Article II(5) of its Statute. The EPO further submits that under Article 1(5) of the Service Regulations the latter apply to Vice-Presidents only insofar as there is express provision to that effect in their contract of employment; but the specimen contract for the appointment of Vice-Presidents makes no reference to Articles 33 to 38 of the Service Regulations.

On the merits, the Organisation advances similar arguments in support of its plea that the complaints lack substance.

4. As members of the Staff Committee and of the General Advisory Committee, the complainants are entitled to challenge a measure on the grounds that prior consultation with the General Advisory Committee did not take place. Given the nature of the impugned decision, they may appeal against it directly (see for instance Judgment 1147, *in re* Raths).

The objections to receivability on the grounds that Article 38 of the Service Regulations does not apply will be examined with the merits.

5. All that the Tribunal need determine is whether Article 38(3) of the Service Regulations, providing for consultation with the General Advisory Committee, applies to the adoption of the Guidelines concerning the appointment of Vice-Presidents. Taken alone, the Guidelines could fall within the cases mentioned in Article 38(3) requiring submission to the General Advisory Committee since they constituted a measure which concerns part of the staff. Moreover, being a relatively important measure, on the basis of Article 38 alone the Guidelines might warrant consultation of the General Advisory Committee (on Article 38 see Judgments 1398, *in re* Vollering No. 5; 1488, *in re* Schorsack; 1618, *in re* Baillet No. 2 and others; and 1978, *in re* Bousquet No. 3 and others).

But do the Guidelines fall within the scope of Article 38 and are they consistent with the Convention, the more authoritative text?

Both parties produce arguments of weight in support of their cases. The argument based on the Administrative Council's competence to appoint (Article 11 of the Convention) is not on its own decisive, since that competence excludes neither prior consultation nor the right to challenge such a decision or a related directive, in accordance with the Service Regulations.

More pertinent is the argument concerning the President's role under Article 11 of the Convention with regard to appointments made by the Administrative Council: although the President must "propose" candidates for membership of Boards of Appeal, he is merely "consulted" before the appointment of Vice-Presidents, and he is not required to give an opinion before the appointment of his successor. This distinction was drawn deliberately by the Convention's authors and no doubt relates to the procedure for appointing Vice-Presidents, and not the procedure for adopting guidelines on their appointment. It nonetheless reflects the authors' wish to endow the Administrative Council with a wide measure of latitude particularly in the appointment of the President, but also in the appointment of the Vice-Presidents, owing to the relatively "political" nature of such decisions; consequently, to impose consultation of an internal joint body – the General Advisory Committee – before the adoption of guidelines on such appointments would appear unusual.

The scope of the Service Regulations is formally defined in Article 1(5), which states that: "These Service Regulations shall apply to the President and Vice-Presidents ... only in so far as there is express provision to that effect in their contract of employment." But the specimen contract adopted by the Office for the appointment of Vice-Presidents contains no reference to Article 38, a fact that is not in dispute. A literal interpretation of Article 1(5) would mean that Article 38 does not apply to all measures concerning Vice-Presidents, including the adoption of guidelines on their appointment. While it is understandable that a contract of employment should specify which contractual provisions of the Service Regulations apply to it, there is no reason why it should set out rules applying to Vice-Presidents as a category. Be that as it may, Article 1(5) of the Service Regulations creates the presumption that the Regulations do not apply to the President and Vice-Presidents. And that presumption implies that Vice-Presidents come under other rules and are subject to the Service Regulations only exceptionally (where they are in like situations to other staff). In view of the partly "political" nature of the appointment of senior employees, it is understandable that such appointments and any rules governing them should not be subject to an opinion from a joint body.

The preamble to decision CA/D 14/96 cites Article 7 of the Service Regulations. Does this mean that Article 7 is to apply to the appointment of Vice-Presidents, thus bringing such appointments within the scope of Article 38? In formal terms this would appear to be the case. However, it is plain from the operative articles of the Guidelines that the Administrative Council chose not to apply the regulations pertaining to the staff as a whole and to establish different ones (because senior employees are appointed by the Council). What it actually applied, therefore, was not the Service Regulations but a procedure specific to Vice-Presidents. So the presumption created by Article 1(5) was not reversed.

Since Article 38 of the Service Regulations does not apply, the complainants' main and subsidiary claims must be dismissed.

## DECISION

**For the above reasons,**

**The complaints are dismissed.**

**In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

*(Signed)*

**MICHEL GENTOT** **JEAN-FRANÇOIS EGLI** **SEYDOU BA**

**CATHERINE COMTET**

*Registry's translation,*
*the French text alone*
*being authoritative.*

# NINETIETH SESSION

***In re* Cervantes (No. 8),**
**De Lucia (No. 3), Kagermeier (No. 7),**
**Luckett (No. 5) and Munnix (No. 4)**

**Judgment No. 2037**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr Jean-Pierre Cervantes, the third complaint filed by Mr Gennaro De Lucia, the seventh complaint filed by Mrs Ingrid Kagermeier, the fifth complaint filed by Mr Paul Luckett and the fourth complaint filed by Mr Serge Munnix against the European Patent Organisation (EPO) on 14 March 1999, the EPO's reply of 27 May, the complainants' rejoinder of 30 July, the Organisation's surrejoinder of 23 September and Mr M.'s letter of 8 December 1999 stating that he has no observations to make regarding the present case;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out in Judgment 2036 delivered this day (*in re* Cervantes No. 7 and others).

The complainants are employees of the European Patent Office, the secretariat of the EPO. At the date of the impugned decision, they were all members of the Staff Committee and of the General Advisory Committee.

At its 62nd Session, held from 12 to 14 June 1996, the Administrative Council adopted a "Specimen contract concerning the appointment and terms of employment of Vice-Presidents". Under Article 4 of this contract, the provisions of the Service Regulations concerning social security are applicable. Article 5 of the contract reads in part:

> "The provisions of the Pension Scheme Regulations shall apply, subject to the following:
>
> (a) The minimum period of service required by Article 7 of the Pension Scheme Regulations for entitlement to a retirement pension shall be reduced from ten to five years."

The Council also decided to amend Article 1(5) of the Service Regulations, which now reads:

> "These Service Regulations shall apply to the President and Vice-Presidents of the Office only in so far as there is express provision to that effect in their contract of employment."

The Council appointed Mr M. as Vice-President in charge of Directorate-General 3 (DG3) and mandated its Chairman to negotiate with him the terms and starting date of his contract. At its 63rd Session, held on 10 and 11 October, the Council appointed Mr M. to the post for a five-year term as from 1 December 1996, and authorised its Chairman to sign the contract of employment.

On 27 February 1997, each of the complainants appealed to the Chairman of the Council against the appointment of Mr M., pleading that the latter's contract, which was based on the specimen contract, derogated from the Service Regulations and other rules applying to employees. In a letter of 4 April 1997, the Chairman informed the complainants that he could not allow their appeals and that the matter had been referred to the Council's Appeals Committee. The Committee reported on 10 November 1998. It found the appeals time-barred and hence irreceivable, and recommended rejection. At its 73rd Session, held from 8 to 10 December, the Council unanimously decided to reject the appeals. Its Chairman so informed the complainants in a letter of 11 December 1998. That is the impugned decision.

B. The complainants contend that their complaints are receivable. The Appeals Committee regarded the decision of October 1996 to appoint Mr M.

as the one adversely affecting them. But they disagree: that decision was not final and could not become so for as long as the Vice-President had not signed his contract and had not undergone the medical examination prescribed by Article 9 of the Service Regulations. The complainants assert that they did not become aware that Mr M. had actually taken up his duties until December 1996. Some learned at the 65th Session of the Council, held from 3 to 5 December – when he made his first public appearance as Vice-President – and others found out by reading *Gazette* No. 24/96 of 9 December. So those dates set off the time limits for appeal.

On the merits, they state that the decision to appoint Mr M. as Vice-President in charge of DG3 causes them injury. The terms of the specimen contract allow Vice-Presidents to draw a retirement pension and to benefit from the Organisation's health insurance scheme after a "considerably shorter" qualifying period than that required for other employees. The rates of contribution to the retirement pension and health insurance schemes have so far remained reasonable because the great majority of staff contribute for far longer than the minimum of ten years. By allowing more staff members to join the ranks of those not reaching or only just reaching the ten-year threshold, the Council is in fact making the whole staff bear the cost of a "special benefit" granted to only a few. The Organisation's next actuarial study will take account of the special benefits in reassessing contribution rates. The additional cost generated is "far from negligible" and the fact that each individual will bear only a small part of it does not make the Council's decision lawful. Indeed, the decision could constitute a "dangerous precedent" since more derogations could result in even higher contributions.

Moreover, the Administrative Council's decision is unlawful because it contravenes the principle of equality of treatment in that its sole purpose is to allow Mr M. to benefit from a retirement pension, to which he would not otherwise be entitled. His position does not warrant different treatment of that kind. The Pension Scheme Regulations in fact authorise an employee who has not fulfilled the prescribed qualifying period to draw a pension only in cases of what the complainants call "*force majeure*", for example invalidity. Lastly, they point out that the specimen contract should have been sent to the General Advisory Committee for an opinion in accordance with Article 38(3) of the Service Regulations.

The complainants ask the Tribunal to quash the Administrative Council's decision to appoint Mr M. to the post of Vice-President in charge of DG3 or, failing that, to rule that the additional cost the decision incurs for the retirement pension and health insurance schemes must be borne entirely by the Organisation's budget and not jointly financed by employees' contributions. They also claim moral injury in an amount of 1,000 German marks for every month that the Council refuses to withdraw its decision, and 5,000 marks in costs.

C. In its reply the EPO contends that the complaints are irreceivable. Insofar as they are impugning the establishment of individual employment conditions for Mr M., the complainants are challenging not the latter's contract but the adoption of the specimen contract. The internal appeals filed on 27 February 1997 were time-barred since all staff were informed of the adoption of the specimen contract on 17 June 1996 by Communiqué No. 8 issued by the President of the Office. Furthermore, the complainants should have challenged the specimen contract even though it was a general decision, because they knew it would never be applied to them individually.

Even supposing the complainants are impugning only the decision to appoint Mr M., their appeals are still time-barred. That decision was taken in October 1996 at the Council's 63rd Session, which some of the complainants attended as staff representatives, and was announced to the entire staff in the President's Communiqué No. 9 of 18 October 1996. The statutory three-month time limit was therefore exceeded.

The appointment of Mr M. was not conditional. The President of the Office had already come to an agreement with the chosen candidate and the Council had authorised its Chairman to sign the contract with him. So there was no doubt as to the finalisation of the contract.

The EPO states that the injury alleged by the complainants is "purely hypothetical", so the complaints are irreceivable on that score too.

In subsidiary pleas, the Organisation contends that the decision to set a minimum qualifying period of five years for entitlement to a retirement pension is not in breach of equal treatment because the complainants and Vice-Presidents are in different positions in fact and in law. In view of the relatively short length of Vice-Presidents' contracts, it is logical to reduce the qualifying period. By contesting the distribution among all staff members of the cost of the benefits granted to Vice-Presidents, the complainants are seeking to call into question the principle of solidarity which underpins pension and health insurance schemes. The qualifying period has been shortened only for Vice-Presidents, of whom there are five. So the effect on contributions can only be infinitesimal, particularly as Mr M. is the only Vice-President who is not a permanent employee. The Organisation adds that it is presently recruiting a significant number of young examiners, which is bound to have a positive effect on the financial balance of the above schemes.

The EPO explains that Article 38 of the Service Regulations is immaterial here. Under the terms of the European Patent Convention, the Administrative Council is competent to decide on all matters relating to the conditions of employment of staff. It also has sole competence for the appointment of Vice-Presidents, the President being merely consulted. Consequently, not having the authority to initiate, the President may not refer matters to the General Advisory Committee. Furthermore, in deciding not to apply Article 38 to the specimen contract, the Council was simply implementing the amendment it made to Article 1(5) of the Staff Regulations. Besides, even supposing Article 38 did apply, none of the instances listed in its paragraph 3 would be pertinent in this case.

D. In their rejoinder the complainants point out that the existence and extent of the injury are issues of substance and not of receivability. They argue that they could not have impugned the specimen contract since it was a regulatory measure taken by the Council. Precedent has it that such decisions may be challenged only by way of exception, that is by appealing against an individual decision which causes them injury. Such is the case here.

The principle of solidarity may warrant different treatment, for example, where the difference arises from a staff member's social or family situation, but not where it is based on political considerations. Moreover, the recruitment of more young examiners does not justify causing injury to each individual employee.

E. In its surrejoinder the Organisation asserts that the existence of injury is a prerequisite for receivability. Citing the case law it contends that the complainants have failed to demonstrate that the decision under challenge impaired the rights and safeguards which they consider their status confers on them. It adds that payment of a retirement pension to Vice-Presidents at the end of their five-year contract is no more than a possibility "depending on the choice of those concerned", and that continued membership of the health insurance scheme is contingent on that choice. Thus, the alleged negative consequences for the retirement pension and health insurance schemes will not materialise unless Mr M. leaves his post before completing ten years of service.

## CONSIDERATIONS

1. Until 1996 the Vice-Presidents of the European Patent Office were appointed informally by the Administrative Council after consultation of the President of the Office (Article 11 of the European Patent Convention). They used also to be permanent employees. But as the Organisation grew and the duties of Vice-Presidents became "highly political" the EPO decided to recruit them on a contractual basis. Accordingly, at its 62nd Session, held in June 1996, the Council adopted a "specimen contract" for their appointment. It also amended Article 1(5) of the Service Regulations by introducing a new rule whereby the Service Regulations would apply to the Vice-Presidents only insofar as their contract expresaly said so. At that session, the Council also appointed Mr M. as Vice-President in charge of DG3 and mandated its Chairman to negotiate the terms of his contract with him.

In October 1996 at its 63rd Session, the Council noted that Mr M. had agreed the terms of his contract with the President of the Office and the Council Chairman, and appointed him for five years as from of 1 December 1996, authorising the Chairman to sign the contract. The appointment was notified to the staff by the President's Communiqué No. 9 of 18 October 1996, and by a Staff Committee information document of 17 October 1996.

Although the written contract has not been produced, it is not disputed that it contains a clause – taken from the specimen contract – allowing

Mr M. to acquire the right to a retirement pension after only five years of service, whereas Article 7 of the Pension Scheme Regulations requires a minimum of ten years of service for permanent employees.

At its 65th Session, held in December 1996, the Council adopted "Guidelines" on the recruitment of Vice-Presidents. The staff representatives who attended the session were able to observe that Mr M. was present and had therefore taken up his post.

2. The gist of the complaints is that the clause in the specimen contract entitling new Vice-Presidents to a retirement pension after only five years of service gives them an advantage which the permanent employees will ultimately pay for since they co-finance the pension scheme. The Organisation doubts the likelihood of such additional costs.

There is no need to determine whether the decision to appoint Mr M. has already caused the complainants injury or whether they should, if necessary, claim at some later date that they have suffered material injury.

That issue may remain unresolved since the complaints are in any case irreceivable.

3. For a complaint to be receivable all means of internal appeal must have been exhausted (Article VII(1) of the Statute of the Tribunal). That requirement presupposes that such appeals were timely.

The Appeals Committee of the Council considered that the appeals of 27 February 1997 against the appointment of Mr M. were not introduced within the time limit of three months prescribed by Article 108(2) of the Service Regulations, which starts to run "on the date of publication, display or notification of the act appealed" (Article 108(3) of the Service Regulations). The Committee found that the complainants had been informed of the appointment at the 63rd Session of Council, on 10 and 11 October 1996, or at the latest on 18 October 1996 by the President's Communiqué No. 9. The complainants maintain that they did not become aware that Mr M. had actually taken up office until the 65th Session of the Council, held from 3 to 5 December 1996, which he attended, or until they read the *Gazette* of 9 December 1996. Before then, they say, the appointment of Mr M. was not final, since he had yet to sign the EPO's proposed contract and satisfy the conditions for appointment set in Articles 8 and 9 of the Service Regulations.

When what is challenged is a contract between an organisation and a future employee, the act which may be impugned is the contract as communicated by the organisation, irrespective of the possibilities open to the contracting parties to appeal internally – such as a medical examination still to be undergone (see Judgment 1964, *in re* Liaci in this connection). Legal certainty requires communications from an organisation to be reliable so that all concerned know when the time limit for an appeal starts to run. This is all the more important when the organisation is not bound to reveal the exact content of the contract.

In this instance, after the Council's 62nd Session, the President of the Office issued Communiqué No. 8, which says:

> "The Administrative Council has ... designated [Mr M.] ... as the next Vice-President in charge of DG3. I have been mandated to negotiate the terms of his contract with him to allow its approval at the Council session next October ..."

Having reached an agreement on the terms with the President of the Office and Mr M., at the 63rd Session the Chairman of the Council proposed that the Council appoint Mr M. and he sought its permission to sign the contract of employment.

The appointment was notified to all staff by the President's Communiqué No. 9 of 18 October 1996. The Staff Committee's information document of 17 October 1996 confirmed it:

> "The Council confirmed the appointment of [Mr M.] ... as Vice-President of DG3, an appointment which it had been proposed, at the June Session, to finalise after he had agreed on the details of his contract (unpublished) with the Chairman of the Council."

The Organisation thus gave official notification that it had reached an agreement with Mr M. on the terms of his contract. Besides, the staff already knew of the specimen contract for the appointment of Vice-Presidents, particularly the clause setting a five-year qualifying period for a retirement pension. They were therefore in a position to act within the time limit.

A third party wishing to file an appeal against this decision of appointment had sufficient basis to do so in full possession of the facts. Since the Organisation had already notified its decision and its agreement with the future Vice-President on his terms of appointment, the signing of the contract and the prior medical examination appeared to be mere formalities. It would have been sheer pedantry to insist that they be completed and the staff so informed before the appointment of the Vice-President was announced. As for the complainants, they could have ascertained that the time limit for appeal had started to run as soon as the staff were informed of the appointment of the new Vice-President.

Since the internal appeals were out of time, the complaints are irreceivable.

## DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

the contract and the prior medical examination appeared to be mere formalities. It would have been sheer pedantry to insist that they [illegible]

[illegible] of the [illegible] the appointment of Vice-Presidents, [illegible] qualifying period for a retirement pension. They were [illegible] to [illegible] within the time limit.

A third party [illegible] an appeal against this decision of appointment [illegible] full possession of the facts since the Organization had already [illegible] its decision and its agreement with the [illegible] Vice-Presidents on the terms of appointment, the signing of

# NINETIETH SESSION

***In re* Umar (No. 2)** **Judgment No. 2038**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the second complaint filed by Mr Ijaz Umar against the International Atomic Energy Agency (IAEA) on 7 December 1999 and corrected on 12 January 2000, the IAEA's reply of 15 May, the complainant's rejoinder of 8 August and the Agency's surrejoinder of 24 October 2000;**

**Considering Article II, paragraph 5, of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which neither party has applied for;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant, a citizen of Pakistan who was born in 1943, joined the staff of the Agency in Vienna in 1974. In 1986 he was assigned to the IAEA's Toronto Regional Office. In July 1994 he was transferred back to IAEA headquarters in Vienna and thereafter his work required trips to Canada.**

**In a memorandum of 3 February 1998 the Head of Internal Audit informed the complainant that the Office of Internal Audit and Evaluation Support was carrying out an overall review of staff travel pertaining to the Toronto Office and that it had conducted an audit of the claims for reimbursement of travel expenses submitted by him between 1992 and**

1996. He asked the complainant to clarify certain matters connected with his family's air travel to Vienna, when he changed duty stations in July 1994, and nineteen other travel claims relating to duty travel during the period from 1992 to 1995. As also stated in that memorandum, the Agency had sought information from the relevant airline. Its inquiries had revealed inconsistencies between details supplied by the complainant and information given by the airline. In a memorandum of 5 February 1998 the Head of Internal Audit asked the complainant to clarify discrepancies in other travel claims.

On 13 March the complainant provided the required explanations and documentary evidence. The Office of Internal Audit sent him a copy of its draft investigation report on 23 November, giving him the opportunity to comment on it. He submitted his comments on 25 November and on the 26th the Office sent him a copy of the final report, summarising its findings under four "categories". First, the report stated that in spite of the fact that one of the complainant's sons did not return with the family to Vienna, but flew to Pakistan to continue his schooling, the complainant submitted the stub of his son's unused ticket with his travel claim, leading the Agency to believe that the son had travelled with the family. Prior to leaving Toronto the complainant had converted his son's Toronto-Vienna ticket, paid for by the Agency, into a "miscellaneous charge order", which he later used for purposes other than those recognised by the IAEA. Secondly, the report stated that when he was reassigned to headquarters the complainant received an assignment grant, part of which was paid to him in respect of the son who was not living in Vienna. The complainant did nothing to correct that overpayment. Thirdly, the report referred to duty travel which the complainant had extended for private purposes without declaring his actual itinerary on his travel claim. Lastly, it referred to discrepancies in numerous claims for travel expenses where dates entered by the complainant on travel claim forms conflicted with flight departure dates supplied by the airline. This led in some cases to the complainant gaining in terms of daily subsistence allowance and annual leave.

In early 1999 the Office of Internal Audit investigated another matter which had come to light: the rental subsidy which the IAEA had been paying the complainant since his return from Toronto. On 1 June 1996 he and his family changed apartments in Vienna and on 18 March 1996 the complainant had submitted an application form in order to continue receiving the subsidy for the new address. He attached a "lease" agreement drawn up in March 1996 between himself and a private individual, Mr F., identified as the lessor. The Agency continued to pay the subsidy and he renewed his application for rental subsidy on 8 May 1997 and 22 April 1998. The Office of Internal Audit concluded that the lease in question was not an authentic rental agreement, but rather an agreement to pay back a loan to Mr F. On 24 February 1999 the Head of Internal Audit sent the complainant a copy of the draft investigation report which was produced as a result of the inquiry. The complainant sent in his comments and an explanation the following day.

By a memorandum of 10 June 1999 the Deputy Director General for Administration referred all the matters regarding the complainant's duty travel and rental subsidy to the Joint Disciplinary Board. In its report of 6 August 1999 the Board found that the complainant had made a substantial financial gain, and estimated the Agency's loss at 209,501.50 Austrian schillings. It recommended dismissing him for misconduct. The complainant wrote to the Chairperson of the Board on 13 August, submitting further comments. The Board reconvened on 1 September to consider those comments but, in an addendum published the same day, stated that the information he had provided did not materially alter its interpretation of the facts or affect the conclusions of the Board. The Director of the Division of Personnel wrote to the complainant on 8 September 1999, notifying him of the Director General's decision, taken under Staff Rule 11.01.2(A), to dismiss him that same day for misconduct. The Director said that the "total damages" incurred by the Agency would be deducted from the complainant's final entitlements, that he would receive three months' pay in lieu of notice but would not receive a termination indemnity. That is the impugned decision.

B. The complainant argues that his dismissal was based on errors of fact and law. It was unfair and tainted with procedural irregularity, thereby violating basic tenets of international employment law as well as his fundamental rights. He holds that his professional conduct was impeccable, and his "misconduct" did not warrant dismissal. The sanction was out of all proportion to his actions. Moreover, he was dismissed without first receiving a reprimand or warning.

He refers to the "difficult time" that his family experienced on their return to Vienna, which constituted mitigating circumstances that the Agency failed to take into account. He denies that he attempted to defraud the Agency. Submitting a ticket stub with his travel claim for his son, who had not returned to Vienna but had gone to Pakistan on a ticket paid for by the complainant, was the result of a mere oversight. His failure to report the overpayment in his assignment grant was also an "understandable oversight". With regard to the matter of an extension of his duty travel for private purposes, he points out that prior to 1995 or 1996 there was no requirement to declare private stopovers. Again the matter in question was the result of an oversight because he had developed the habit of preparing his travel claims in advance of his duty travel and had neglected to amend them afterwards. As for the alleged unjustified payments of daily subsistence allowance, he points out that on some occasions when travelling within Canada he did not claim the amount that he was entitled to.

The complainant claims that the Agency did not pay due regard to the explanations and evidence which he supplied but chose instead to accept diverging information provided by the airline. Thus there was breach of his right to "fair and lawful proceedings". In carrying out its "relentless investigation" the Office of Internal Audit did not acquire its information from reliable sources. It contravened paragraph 5 of section 8, part II, of the IAEA's Administrative Manual dealing with the "Protection of Personnel Confidential Information" in that it has "stored, used and communicated" incorrect information which was gathered from an unreliable source. The Agency denied him an opportunity to make a "full and fair defence". He concludes that because essential facts were overlooked the Director General's decision was flawed.

On the subject of the rental subsidy he submits that although he acted "misguidedly" and in a manner which contravened the standard practice of the Agency with regard to obtaining the subsidy, he nevertheless acted in good faith and his error was excusable. Moreover, he had also offered to repay the sums paid to him by the Agency.

The complainant seeks the quashing of the Director General's decision. He claims reinstatement "with full rights and privileges" from the date of his dismissal or, alternatively, an award of damages. He also claims costs.

C. In its reply the IAEA contends that the complainant set out to defraud the Agency in a deliberate and systematic manner over a period of more than five years, and the Director General was justified in dismissing him. It holds that there was no breach of the principle of proportionality. Because of the nature of his misconduct, the Director General had every reason to follow the recommendations of the Joint Disciplinary Board.

The complainant's submissions to the Tribunal reveal no new facts or legal arguments to refute the documentary evidence produced by the IAEA. For the most part the complainant admits his wrongdoing, and only offers "weak excuses". The Agency contests the complainant's assertion that the information it obtained from the airline company was illegally obtained. There is no reason for him to cast doubt on that information.

With regard to his son's travel to Pakistan the Agency rejects the complainant's view that there was an oversight. In his travel claim, filled in by hand, he expressly mentioned that his son flew from Toronto to Vienna, which was contrary to the facts. The complainant also knowingly received an overpayment of his assignment grant and his plea that it was the result of an oversight cannot succeed. Moreover, even if the complainant had adopted the habit of preparing his claims before travelling, he should have taken the time to make the necessary rectifications afterwards.

On the subject of the rental subsidy paid in respect of the complainant's apartment in Vienna, it says that he took steps to disguise a loan agreement as a "rental agreement" so that he could claim the subsidy. It came to light that the complainant had entered into two agreements both of which purported to be lease agreements on the same apartment: one was with *Firma G.*, a housing company, quoting a rent of 8,000 schillings, and the second agreement was with Mr F., quoting a rent of 17,750 schillings. The lawful owner of the property appeared to be *Firma G.* The agreement with Mr F. was in fact an agreement to pay back a loan, disguised as a rental agreement. The complainant made a false certification on his claim for a subsidy in 1996, and twice thereafter when he applied annually to continue receiving the subsidy.

D. In his rejoinder the complainant presses his pleas. On the matters regarding his duty travel the complainant denies having had any intention to defraud the Agency.

In his view, throughout the whole proceedings the Agency acted against him, preferring the airline's findings to his own. The Agency thereby breached the principle of his right to be heard. He submits that the airline's records were at variance with the dates shown on car rental slips which he provided as evidence. But that evidence was disregarded by the Agency. In view of the "uncertain" information supplied by the airline it should not have been used against him.

The complainant says that the amount he was paying to Mr F. constituted the "rent" for the apartment. It was by virtue of the agreement entered into with Mr F. that he was able to occupy the apartment.

E. In its surrejoinder the Agency notes that the complainant does not challenge the documentary evidence it submitted with its reply. That evidence revealed that the complainant had submitted false claims to the Agency on numerous occasions. Until the investigation revealed his actions he made no attempt to return the sums he had illicitly received.

## CONSIDERATIONS

1. The complainant impugns the decision of the Director General of the International Atomic Energy Agency (IAEA) dated 8 September 1999 to dismiss him for misconduct. He asks that it be quashed and that he be reinstated.

2. The complainant, a Pakistani national born in 1943, joined the IAEA in 1974, at its headquarters in Vienna. In September 1986, he was

assigned to the Toronto Regional Office. He was transferred back to Vienna in 1994. In February 1998, as part of an overall review of travel undertaken by the staff of the Toronto Office, the Office of Internal Audit and Evaluation Support reviewed both the complainant's duty travel during the period of his assignment to Toronto and his trips to Canada after his reassignment to Vienna. Several anomalies were found by the Office of Internal Audit and were dealt with in its investigation report under four categories. Additionally, some anomalies were found in the complainant's rental subsidy claims for the period from 1996 to 1999. Pursuant to the final investigation report delivered by the Office of Internal Audit, the case was referred to the Joint Disciplinary Board for consideration of the appropriate disciplinary measures to be imposed. With respect to the complainant's duty travel, its findings were grouped under the same four categories:

(i) On 5 May 1994 the complainant was authorised to travel from Toronto to Vienna with his wife, his three sons and his daughter using pre-paid plane tickets provided by the IAEA. On 4 July 1994 the complainant filed a travel claim in which he stated that he and his five dependants had left Toronto on 29 June and arrived in Vienna on 30 June. He attached the stubs of the air tickets. Before leaving Toronto, the complainant had in fact exchanged the ticket of one of his sons for a "miscellaneous charge order" (MCO) because his son had decided instead to return to Pakistan. The Joint Disciplinary Board found that the complainant had subsequently used the ticket purchased by the IAEA for purposes other than those authorised – a fact that he had not disclosed on his travel claim. He had therefore made a false certification.

(ii) Part of the assignment grant which the complainant received from the Agency was paid in respect of his son on the mistaken assumption, made on the basis of the completed travel claim referred to above, that he had gone to live in Vienna. The Joint Disciplinary Board found that the complainant had accepted that part of the payment knowing that he was not entitled to it. As part of his travel claim he had attached the stub of his son's ticket which had been converted into an MCO, and had thereby given the impression that it had been used as authorised.

(iii) When still assigned to the Toronto Office, the complainant was authorised to attend a training course in Vienna from 25 April to 6 May 1994. He submitted his travel claim indicating a return journey from Toronto to Vienna. Prior to his departure from Vienna, the complainant had his ticket endorsed and flew to Pakistan, where his father was hospitalised. The Board found that he had failed to record his travel to Pakistan on his travel claim and this failure was contrary to the certification he had made as to his actual itinerary.

(iv) In fourteen cases identified by the Office of Internal Audit the complainant's actual itinerary differed from that given and attested to in his travel claim. The Board found that, given the number of times this had happened, the complainant must have been aware that the travel claims were inaccurate and his actions could therefore be considered "regular abuse of Agency travel".

3. The Joint Disciplinary Board found that the complainant had contravened the rules relevant to duty travel. He had also failed to honour his certification that the travel claim represented his "actual itinerary and [his] actual authorized expenses while on official travel". The Board concluded that the complainant's activities amounted to misconduct.

4. With respect to the rental subsidy claimed by the complainant from 1996 to 1999, the Board found that he had entered into a fictitious lease agreement in relation to an apartment in Vienna. He had submitted it to the IAEA, and failed to disclose his true lease agreement, with the intention of obtaining a rental subsidy from the organisation to which he knew he was not entitled. In the course of so doing he made a false certification on his original claim in 1996 to the effect that the information he had given was correct. He did so again on his two subsequent annual re-applications. The Board found that these actions amounted to misconduct.

5. The Joint Disciplinary Board recommended that the complainant be dismissed and on 8 September 1999 the Director General dismissed him. That is the impugned decision.

6. The complainant has failed to submit any new facts or legal arguments that could refute the overwhelming documentary evidence submitted by the Agency which establishes beyond doubt that the complainant undertook to defraud his employer in a systematic and deliberate manner. Only a brief review is necessary of the various issues raised by the complainant.

*Duty travel anomalies*

*Conversion of a ticket paid for by the IAEA into a miscellaneous charge order and thereafter used for purposes other than those authorised*

and

*Overpayment of the assignment grant in respect of the complainant's son*

7. The complainant states that he converted his son's ticket into a miscellaneous charge order and that he purchased with his own funds a ticket for him to travel to Pakistan. He argues that his failure to mention the fact that his son had actually not travelled to Vienna was but a mere oversight on his part. This is in direct contradiction to the complainant's signed statements attesting to the accuracy of the information given on the travel claim. The complainant received payment on the basis of his statements and made no attempt to rectify the situation. The Joint Disciplinary Board found that the complainant had attached the stubs of all six tickets to his claim, and thereby gave the impression that the ticket had been used as authorised. The IAEA then issued an assignment grant believing that all five of the complainant's dependants had travelled to Vienna.

8. The complainant was heard by the Joint Disciplinary Board and had every opportunity to present his arguments. The Board clearly did not believe him and based its decision on the evidence before it. In the absence of any new evidence pertaining to this matter, and in the light of the admissions of the complainant, the documentary evidence and the findings of the Board, there is no reason why the Tribunal should now accept the explanations provided by the complainant.

9. The Board found that the financial loss sustained by the organisation was 19,550 Austrian schillings – the cost of the original unused ticket. The portion of the assignment grant relating to the complainant's son was calculated at 33,000 schillings. There is no reason to disturb these findings.

*Use of a ticket paid for by the IAEA for purposes other than those authorised*

10. Before the Board, the complainant testified that, owing to the sudden severe illness of his father, he had obtained an endorsement on his return ticket from Vienna to Toronto in order to travel to Pakistan. The complainant nevertheless submitted a travel claim without mentioning his detour. He explained to the Board that he had developed the habit of preparing travel claims in advance and due to his "hectic schedule" had overlooked the need for correction. The Board found that the complainant should have recorded his private travel to Pakistan on his travel claim and that his failure to do so was contrary to the certification he made as to his actual itinerary. The complainant places great weight on the fact that during the relevant period nothing required him to declare his private stopovers. Even if true, that does not change the fact that the complainant certified that he had followed a certain itinerary, when in fact he had done otherwise.

*Incorrect claims relating to official travel resulting in the unjustified payment of daily subsistence allowance (DSA) and additional annual leave*

11. The findings of the Board read as follows:

> "The Board finds no reason to doubt the veracity of the information on the flights actually travelled provided by [the airline company] in relation to these fourteen cases. The Board notes that in eight of these [the complainant] does not contest the observations of Internal Audit. In the remaining cases, the Board finds [the complainant's] evidence of car rental agreements to be insufficient evidence one way or the other and bases its findings on the information obtained from [the airline]. The Board noted that, in giving evidence before the Board, [the complainant] continued to deny the strong evidence provided by [the airline].
>
> Accordingly, the Board concludes that in all the cases identified by Internal Audit, [the complainant's] actual itinerary differed from that given in his Travel Claim, contrary to the certifications he made. Given the frequency with which this happened, he must be taken to have been aware that the Travel Claims as submitted were inaccurate and his actions can be characterised as the regular abuse of Agency travel.
>
> The Board concluded that [the complainant] had made incorrect certifications and had thereby gained DSA, determined by Internal Audit to total ATS 14,995, and annual leave to which he was not entitled."

12. The complainant contends that the Board should have at least considered the evidence he submitted at the hearing, namely the car rental receipts. As can be seen above, the Board did in fact consider the receipts, but found them to be "insufficient evidence one way or the other". It is not possible to ascertain from some of the receipts whether or not it was the complainant who actually returned the rented cars. Furthermore, it was quite understandable for the Board to give more weight to the documentation provided by the airline than to the car rental information provided by the complainant. The complainant states that he presented the Board with explanations with respect to the procedures he followed when returning the cars. It was apparently not unusual for him to put the keys in a "drop box" prior to boarding a plane. Only after his flight had departed did the car rental office process the return of the vehicle, thereby causing a later time of return to be shown.

The Board cannot be criticised for having disbelieved the complainant considering the circumstances. In any case, the explanations he provided only serve to indicate that the car rental data was, after all, fairly unreliable. Nothing was presented that would cast any doubts on the reliability or accuracy of the airline's information.

13. In the end, it appears that the complainant does not dispute the fact that the travel claims do not reflect the whole truth about his itinerary

in eight instances. In the six other cases, the evidence submitted by the complainant was deemed by the Board to be insufficient to outweigh the evidence from the airline submitted by the IAEA. There is simply no valid reason advanced why the Tribunal should review these findings, which are based on credibility and reliability, made by a body which had every opportunity to assess the value of the complainant's evidence.

### *Anomalies pertaining to the rental subsidy*

14. The Board's findings read as follows:

> "The Board noted that [the complainant] had entered into two agreements which purported to be lease agreements in relation to the same property, one with [*Firma G.*] dated 8 March 1995, quoting a rent of approximately ATS 8,000, and a second agreement with [Mr F.] dated 18 March 1996, quoting a rent of ATS 17,750. The agreement with [*Firma G.*] was clearly the true lease agreement. The agreement entered into with [Mr F.], who had no known legal interest in the property but who was described in the document as the owner or lessor, went into full details concerning deposit and rent for the apartment, maintenance and service charges, and damage to the property, and must be characterised as a fabrication. The Board had to conclude that [the complainant] knew that his agreement with [Mr F.] was in the nature of an investment or loan agreement, but took efforts to disguise it as a rental agreement. The Board concluded that he had submitted it, and failed to declare his true lease agreement, with the intention of obtaining a rental subsidy to which he would not otherwise have been entitled.
>
> As to [the complainant's] contention that the matter had been clarified at his own initiative, the Board would note that such clarification as was provided appeared after his request for discontinuation of rental subsidy in relation to the property, and after [the IAEA's] subsequent request that he submit evidence of termination of lease. In any case, such clarification should have been provided by [the complainant] at the time of his original application two and a half years previously. At that time, he had made a false certification on his claim, and had repeated this on his two subsequent annual re-applications."

15. The complainant admits that he acted in a manner which contravened the standard practice of the IAEA. He alleges that he acted in good faith and his error was excusable. The complainant's explanations are simply not supported by the documentation. It shows very clearly that the complainant had fabricated the rental agreement with Mr F. and that he failed to declare to the IAEA his true lease agreement with *Firma G.* with

the intention of obtaining a rental subsidy to which he would not have otherwise been entitled . The Board heard the complainant's explanations and did not believe them; its findings were completely reasonable and there is no proper basis on which the Tribunal could interfere with them.

*Proportionality of the sanction imposed*

16. The applicable principles were enunciated by the Tribunal in Judgment 1828 (*in re* Kalla) delivered on 28 January 1999. Under consideration 12 the Tribunal made it quite clear that in cases of fraud, even if the amount at stake is not large, "an intent to defraud the Organization is a most serious offence. The Organization may expect the highest standards of integrity from its staff; it could not possibly just overlook the fraud; and there was nothing disproportionate about dismissing [the complainant] for the misconduct she had committed."

17. The complainant maintains that he had no intention whatsoever to defraud the IAEA. That assertion is simply incompatible with his actions which reveal a long, systematic and deliberate plan to obtain from his employer funds to which he was not entitled. He has fallen far below the standards of honesty and loyalty which are required of an international civil servant. Dismissal was a wholly proportional punishment.

18. The complaint must accordingly be dismissed.

## DECISION

For the above reasons,
The complaint is dismissed.

**In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

Michel Gentot

MICHEL GENTOT

JAMES K. HUGESSEN

Flerida Ruth P. Romero

FLERIDA ROMERO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

**Organisation internationale du Travail** **International Labour Organization**
***Tribunal administratif*** ***Administrative Tribunal***

***Registry's translation,***
***the French text alone***
***being authoritative.***

# NINETIETH SESSION

***In re* Bousquet (Nos. 5, 6 and 7)** **Judgment No. 2039**

**THE ADMINISTRATIVE TRIBUNAL,**

**Considering the fifth, sixth and seventh complaints filed by Mr Karl Bousquet against the European Patent Organisation (EPO) on 13 December 1999, the EPO's single reply of 3 March 2000, the complainant's rejoinder of 13 June and the Organisation's surrejoinder of 4 September 2000;**

**Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;**

**Having examined the written submissions and decided not to order hearings, which neither party has applied for;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant is of French nationality and was born in 1952. At the material time he was a representative of the staff of the European Patent Office – the secretariat of the EPO – and a member of the Staff Union of the European Patent Office (SUEPO).**

**For the purpose of rapid and easy communication between EPO sites, the Staff Committee, which is composed of a Central Committee and local sections at the different places of employment, was allowed access to "Office Vision", the EPO's internal electronic mail system (hereinafter, the "OV system"). In a letter of 8 December 1997 to the Chairman of the Central Staff Committee, the Vice-President in charge of**

Directorate-General 4 (DG4) mentioned that staff representatives had started to use the OV system to send staff texts issued by the Staff Union. He considered that the facilities provided for official staff representation were thus being misused, and that a distinction should be made between official staff representation on the one hand, and the activities of the Staff Union on the other. He therefore asked the Chairman of the Central Staff Committee to take the necessary steps to rectify the situation. In a letter of 18 December 1997, the Vice-President in charge of DG4 informed the Chairman of the Central Staff Committee that the mass distribution of information by staff representatives through the OV system was disrupting the smooth operation of the technical infrastructure. It had to cease forthwith or permission to use the system would be withdrawn. He specified that sending documents simultaneously through the system to more than fifty people was not allowed. On 24 March 1998 the Vice-President again wrote to the Chairman of the Central Staff Committee to inform him that since the misuse of the OV system had not stopped, he had taken the necessary steps to disconnect the Staff Committee from the system as from 30 March 1998. The President of the Office so informed staff in Communiqué No. 26 of 27 May 1998.

In letters of 19 June 1998, along with other staff members, the complainant appealed to the President against the decision to disconnect the Staff Committee. He appealed in several capacities: as a staff member, as a member of the Staff Committee and as a member of the Staff Union. He invited the President to order the reconnection of the Staff Committee to the OV system and to award him compensation for the injury suffered. In the *Gazette* of 27 July 1998, the Director of Personnel Development announced that the President had not given a favourable response to the internal appeals and that they had been referred to the Appeals Committee. At the date on which the present complaints were filed, the Administration had still not submitted its position to the Appeals Committee on those internal appeals.

In Communiqué No. 47 of 13 August 1999, the President of the Office brought to the attention of all staff the "Guidelines for using e-mail systems and the Internet". Article 4 of the Guidelines provides that "the distribution of e-mail ... to more than 50 people is not allowed without prior ... authorisation". In a letter of 29 October 1999, the Vice-President in charge of DG4 informed the Chairman of the Central Staff Committee that the Guidelines had been approved by the members of the General Advisory Committee appointed by the staff representatives, and that he considered their approval as a "promise" that staff representatives would in future comply with the Guidelines. He indicated that he would see to it that staff representatives were again authorised to use the OV system. At the date on which the present complaints were filed, the Staff Committee had not yet been reconnected.

B. The complainant contends that his three complaints, which he filed respectively as a permanent employee (the fifth complaint), a member of the Staff Committee (his sixth complaint) and a member of the Staff Union (his seventh complaint), meet the requirements of receivability as defined by the Tribunal. He submits that the Tribunal has recognised that a complainant need not exhaust the internal remedies where "the appeal proceedings appear unlikely to end within a reasonable time", as is the case here.

On the merits, the complainant argues that the Tribunal's case law, particularly Judgment 911 (*in re* de Padirac No. 2), recognises the principle of freedom of association and its corollaries (freedom of communication, the right to certain facilities, etc ...) and the interest of an international organisation in having competent and efficient staff representation. He contends that the Administration denied staff representatives access to an important communication facility to "punish" them for using it in a manner of which it disapproves. He deems that the reasons given are inadmissible because they are in fact based on political and not technical considerations as was recognised by the Administration's representatives at the 133rd Session of the General Advisory Committee. The complainant adds that the distinction between the SUEPO and the official representation of the staff through the Staff Committee, established under Articles 33 to 36 of the Service Regulations, is "largely artificial", since most of the members of the Staff Committee are also members of the Staff Union. He submits that the latter are entitled to use the OV system by virtue of the right of association recognised in Article 30 of the Service

Regulations and points out that another association in the EPO, namely the "Amicale", has access to the system.

In each of his complaints, he asks the Tribunal to set aside the decision to disconnect the Central Staff Committee and its local sections from the OV system, as notified on 27 May 1998, and to award him costs. In moral damages he claims: in his fifth complaint – a lump sum of 1,000 German marks, plus 500 marks for each month since the above decision and until the connection is restored; and in his sixth and seventh complaints – a lump sum of 5,000 marks, plus 1,000 marks for each month since the decision and until the connection is restored.

C. In its reply the EPO first requests the joinder of the complaints on the grounds that all three raise the same points of fact and of law and much the same claims.

In preliminary remarks it affirms that, not having obtained any undertaking from the Staff Committee that it would use the OV system properly in future and in view of the new "abuses" committed by the Committee, the Vice-President in charge of DG4 was obliged on 30 November 1999 to withdraw his offer to restore the Committee's connection to the system.

The EPO also contends that the complaints are irreceivable as the complainant is not challenging a final decision. If it did not expedite the processing of the internal appeals, it was because it hoped to reach a negotiated settlement.

In subsidiary argument the EPO explains that the reference to the case law, and particularly to Judgment 911, is immaterial. The issue in the present case is how an organisation should react when a facility is "misused" for the benefit of a staff union, which, unlike the Staff Committee, is not a statutory body. That being so, the EPO is under no obligation to it. It considers that freedom of association was fully respected and that the Staff Committee bears the entire responsibility for the disconnection. Citing the case law, the EPO points out that staff representatives may not abuse rights granted to them, and infers that it is entitled to take measures to prevent any use of the OV system which is contrary to its "legitimate interests", which in this case means having an "efficient" electronic mail system that is "not disrupted by the mass distribution of information from the Staff Union".

The EPO adds that, according to the computer experts, the Staff Committee was restricted to sending messages to only fifty recipients for purely technical reasons: the OV system is a working tool and not a means of mass communication. Moreover, the complainant has misconstrued the adjective "political" as used by the representatives of the Administration, who intended it to mean "advisable". Citing a ruling of 18 January 1990 by the Court of Justice of the European Communities, the EPO points out that, although the Court confirmed the right of employees to join unions, it found that this did not involve an obligation for the organisation to place facilities at the disposal of unions where the staff rules do not so provide, as is the case here. The EPO also explains that no inequality of treatment can be alleged between the Staff Union and the "Amicale" as the latter is a statutory social body established in the interests of the staff by the Office and as such receives subsidies from it. Lastly, the EPO denies that the complainant suffered injury: the messenger service for printed documents is still at the disposal of the Staff Committee and the Staff Union.

D. In his rejoinder the complainant does not oppose the EPO's request for joinder. He points out that by the date on which he lodged his rejoinder, the Administration had still not submitted its position to the Appeals Committee. He contends that, by failing to do so, it deliberately chose to delay the procedure, so he could properly bring his case directly to the Tribunal.

He submits that the Administration placed two conditions on the reconnection of the Staff Committee, namely a restriction on the number of recipients of messages (fifty) and an end to the practice of sending the Union's notes by the OV system. Those conditions were unacceptable since they were a "barely disguised intent to exercise censorship". Moreover, the EPO has overstated the technical difficulties, which are no more serious than the normal risks inherent in any computer system comparable to the OV system. Besides, it would not be inconceivable for the OV system to be both a working tool and a means of mass communication. He points out that the distribution of printed documents is subject to the approval of the EPO.

E. In its surrejoinder the EPO denies that because they ban the use of internal e-mail systems for the purposes of mass communication the Guidelines amount to an instrument of censorship. According to the case law, censorship occurs when the administration of an organisation endeavours to influence the content of communications between the staff association and the staff but nothing of that nature occurred in the present case. The EPO also explains that the use of the Office's computer system both as a working tool and a means of mass communication gives rise to real disruption. Finally, it requests that certain documents produced by the complainant in his rejoinder not be taken into consideration.

## CONSIDERATIONS

1. The only difference between the present complaints is the capacity in which the complainant has filed them, namely as a staff member of the European Patent Office, a member of the Staff Committee and a member of the Staff Union. They are based on the same facts, raise similar issues of law and seek the same redress. They are therefore joined to form the subject of a single ruling.

The EPO requests that certain documents not be taken into consideration. As they do not affect the outcome of the case, it is not necessary to rule on this point.

2. The complaints have arisen from a dispute concerning, on the one hand, the facilities granted to the members of the Staff Committee (Central Committee and local sections), in their capacity as such, to use Office Vision, the EPO's internal electronic mail system (hereinafter the "OV system") and, on the other hand, the scope of those facilities, or more precisely, the number of recipients of e-mail messages, the authors (whether in their capacity as staff representatives, or as representatives of the Staff Union, of which they are members), and the content and length of such messages.

Several staff members filed individual internal appeals against the decision to disconnect the Staff Committee from the OV system as from 30 March 1998. On 19 June 1998 the complainant filed three separate internal appeals on much the same grounds, one in his capacity as a staff member, another as a member of the Staff Committee and a third as a member of the Staff Union. Considering all the internal appeals to be unfounded, the President of the Office referred them to the Appeals Committee. On 27 July 1998 he informed the staff that he had decided to "take one appeal as a standard case" and that the final decision would be applicable to all the appellants.

When these complaints were filed with the Tribunal on 13 December 1999, the Administration had still not submitted its position to the Appeals Committee.

3. As its principal plea, the EPO submits that the internal remedies have not been exhausted within the meaning of Article VII(1) of the Statute of the Tribunal, and that the complaints are therefore irreceivable.

The complainant responds that as no decision on the internal appeals had been made within a reasonable time, he was entitled to go straight to the Tribunal in accordance with the case law.

4. Precedent says that the requirement to exhaust the internal remedies cannot have the effect of paralysing the exercise of the complainants' rights. Complainants may therefore go straight to the Tribunal where the competent bodies are not able to decide on an issue within a reasonable time, depending on the circumstances (see Judgments 1829, *in re* Müller-Engelmann, 1968, *in re* Concannon, and the numerous judgments cited therein).

However, a complainant can make use of this possibility only where he has done his utmost, to no avail, to accelerate the internal procedure and where the circumstances show that the appeal body was not able to reach a decision within a reasonable time (see, for example, Judgments 1674, *in re* Gosselin under 6(b), and 1970, *in re* White). In general, a request for information on the status of the proceedings or the date on which a decision may be expected is enough to demonstrate that the appellant wants the procedure to follow its normal course, and gives grounds for alleging unjustified delay if the authority has not acted with the necessary diligence. However, there are circumstances in which it is unclear whether the procedure has been abandoned or whether the staff member has implicitly consented to the suspension of his appeal in law or in fact. In such cases, the case law says that the staff member must indicate clearly if he wants the procedure to continue. For example, the Tribunal found in one case that a staff member had not met this requirement because an internal appeal he had filed was not referred to the internal appeals body of the organisation, the Administration having taken steps to reach an agreed settlement to the dispute. As the staff member had not sought the continuation or renewal of the procedure, it was found that he had not pursued his appeal "diligently" and so did not qualify to file a complaint directly with the Tribunal (see Judgment 1970). Similarly, in a case in which the internal appeal had been followed by negotiations in order to reach a settlement, it was found that the staff member was not justified in turning to the Tribunal without first indicating either that the procedure should follow its course in parallel with the negotiations or that it should be taken up again without further ado, and then waiting a reasonable time to see what happened (see Judgment 1674 under 6(b)).

5. The issue here is whether staff representatives may use the OV system in that capacity, although they are connected to the system as staff members. The internal appeals were filed in June 1998, and then referred to the Appeals Committee, but the Administration did not submit its position. Nevertheless, it had prepared a draft text entitled "Guidelines for using e-mail systems and the Internet", which was submitted to the General Advisory Committee (GAC), composed jointly of members appointed by the Administration and by the staff representatives, at its meetings on 31 May and 9 July 1999. The Committee was unanimously in favour of the Guidelines, which means that they had the support of the members appointed by the staff representatives. The adopted text was then communicated by the President of the Office to all the staff on 13 August 1999.

The EPO therefore considered it had valid grounds for hoping that the favourable opinion given by the members of the GAC appointed by the staff representatives was an indication that all the staff supported the text, thereby leaving the internal appeals devoid of purpose.

Another staff member, Mr C., asked the Chairman of the Appeals Committee on 31 March 1999 when it would be likely to make a recommendation. On 20 April he was informed that the Administration's response would not be submitted before the end of the year. On 7 October Mr C. repeated his enquiry, and was told that the Committee had still not received the Administration's brief.

On 29 October 1999 the Vice-President in charge of DG4 wrote to the Chairman of the Central Staff Committee. He recalled that the Staff Committee had been disconnected from the OV system pursuant to the letter of 24 March 1998 and stated that:

> "In the meantime, the Guidelines for using e-mail systems and the Internet – following a totally unanimous opinion from the GAC – have come into force.
>
> The fact that the members of the GAC appointed by the staff representatives approved the Guidelines is considered by me as a promise that the staff representatives will in future comply with the new Guidelines.
>
> I will therefore take the necessary steps for the staff representatives to be given access once again to the internal electronic mail system."

However, he added that, in the event of any further misuse, the connection would once again be withdrawn.

Nothing in the evidence shows that either after receiving this letter or prior to filing the present complaints, all or some of the authors of the internal appeals, took steps to advise the Administration that they were not satisfied with the Guidelines and intended to maintain their appeals.

6.(a) The EPO has not agreed to waive the requirement that the internal remedies must be exhausted.

(b) The position is therefore the same as that in precedents which have required complainants, before going directly to the Tribunal, to inform the internal authorities of their continued interest and to ask for the internal procedure to be set in motion again.

After the internal appeals were filed, the Administration took steps for the adoption of guidelines on the use of internal electronic mail systems. While they were being produced, staff representatives would have had the opportunity to give their opinion and make proposals, which could be seen as an attempt to settle the dispute. It is therefore understandable that the Administration did not consider it urgent to submit its brief to the Appeals Committee. Those who had filed the appeals could undoubtedly have objected and expressly requested the continuation of the internal procedure in parallel with the production of the guidelines. But they did not, so they can hardly criticise the Administration, or for that matter the Appeals Committee, for not pressing on with the internal procedure during that period.

After the adoption of the Guidelines, the staff representatives realised that the Administration had endeavoured to develop new rules for the use of the internal electronic mail system and that the GAC had delivered a unanimously favourable opinion on the draft guidelines. Moreover, it was planned to restore the connection to the OV system of the members of the Staff Committee in their capacity as such. They also knew from the letter of 29 October 1999 that the Administration hoped that they would in future comply with the new Guidelines. Indeed, the acceptance of the Guidelines probably involved relinquishing the claims made in the internal appeals, so the latter could be deemed to have been abandoned. There were accordingly grounds for doubting that the appeals were being maintained. Moreover, since the Administration had hopes that the dispute was as good as settled, it is difficult to take it to task for not having submitted its reply at that time.

True to say, in November 1999, after the letter of 29 October 1999, some staff representatives, logging on in their capacity as staff members, again used the internal electronic mail system to send union communications in breach of both the new Guidelines and the earlier rules. There is no need to rule on whether this should be taken as implying that the staff representatives intended to maintain their appeals and reactivate the proceedings. Even if that were the case, the EPO would have had to be given time to process the appeals. And on 13 December 1999, when he filed his complaints with the Tribunal, the complainant could have had no grounds for thinking that the EPO was unable to process his appeals within a reasonable time.

After the GAC delivered a unanimous favourable opinion, it was at best uncertain as to whether the complainant intended to maintain his internal appeals, so he had to take further steps before appealing directly to the Tribunal.

The conclusion is that the internal remedies were not exhausted and the complaints are therefore irreceivable.

(c) Nor are the circumstances such that, in order to make the proceedings simpler the Tribunal would be justified in examining the merits of the complaints despite the failure to exhaust the internal remedies.

Besides, quite apart from any procedural issues that might arise, it is far from certain that the Tribunal is currently in possession of all the elements it would need to rule on the substantive issue of the dispute, namely how to adapt the facilities provided for union activities to modern communication technologies (internal electronic mail, Internet) without disrupting the work of the Organisation. Such issues would be better addressed through dialogue between the parties.

7. There is accordingly no need to consider the other issues raised by the parties.

## DECISION

For the above reasons,

The complaints are dismissed.

**In witness of this judgment, adopted on 9 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

***(Signed)***

**MICHEL GENTOT** **JEAN-FRANÇOIS EGLI** **SEYDOU BA**

**CATHERINE COMTET**

***Registry's translation,***
***the French text alone***
***being authoritative.***

# NINETIETH SESSION

***In re* Durand-Smet (No. 4)** **Judgment No. 2040**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr Jérôme Durand-Smet against the European Patent Organisation (EPO) on 28 February 2000 and corrected on 9 March, the Organisation's reply of 20 June, the complainant's rejoinder of 5 July, the observations submitted by Mr V. on 11 July at the Tribunal's request, Mr E.'s e-mail message of 25 July stating that he had nothing to add to the Organisation's reply, Mr P. not wishing to make any observations, the EPO's letter of 26 July informing the registrar that it would not file a surrejoinder, the complainant's additional comments of 8 August and the Organisation's final submission of 24 August 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgments 1559 (*in re* Durand-Smet), 1832 (*in re* Durand-Smet No. 2) and 1891 (*in re* Durand-Smet No. 3).

Pursuant to Judgment 1832 the Administrative Council considered a first internal appeal filed on 11 July 1996 by the complainant claiming appointment instead of Mr V. to a post as a member of a technical board of appeal, with effect from 1 May 1991. In Judgment 1891 the Tribunal dismissed for failure to exhaust internal remedies part of his third complaint concerning two further appeals. The complainant had lodged a second internal appeal on 17 November 1997 asking for the deletion of a comment casting doubt on his competence and conduct from the minutes of a meeting of the Selection Board of Directorate-General 3 (DG3), dated 2 May 1996, or else disclosure of the minutes in full. In a third appeal filed on 6 February 1997 he had sought the quashing of the appointments of the members of technical boards of appeal as well as their reappointments in 1989 and 1996, particularly that of Mr P.; and had challenged the EPO's refusal to appoint and promote him in 1991 and 1993. By a letter of 28 April 1999 the Chairman of the Administrative Council informed him that the Council had rejected the three appeals and referred them to its Appeals Committee. On 3 November 1999 the Committee issued opinions Nos. 1/99, 2/99 and 3/99 on his first, second and third appeals respectively and recommended that the Administrative Council reject them.

On 4 March 1999 the complainant had filed a fourth appeal against the appointment of Mr E. as a member of a technical board of appeal on the grounds that he had been promoted straight from grade A3 to A5 in breach of the Service Regulations of the European Patent Office, the EPO's secretariat. In a letter of 18 June 1999 the Chairman of the Administrative Council told the complainant that the Council had rejected his appeal and referred it to its Appeals Committee. The Committee issued opinion No. 4/99 on 3 November 1999 recommending rejection.

By a letter of 10 December 1999, the impugned decision, the President of the Council informed the complainant that his four appeals had been rejected.

B. The complainant contends that the rejection of his internal appeals is unfounded. For the appointment of a member of a board of appeal to be lawful, the criteria for promotion set in Article 49 of the Service Regulations must be met. Mr P.'s appointment was therefore unlawful from the start.

Furthermore, Judgment 1559 concerned only the appointment of Mr P. – which was for a period of five years – and his reappointment in 1996 should be quashed.

The comment on him in the minutes of the DG3 Selection Board is subjective and unfounded given his experience, his "high level of competence", his "outstanding performance reports" and in particular the fact that all his reports since 1990 have declared him "fit for membership of a board of appeal".

Lastly, the complainant considers that he fell foul of "illicit manoeuvring" and discrimination. He suspects the Chairman of the DG3 Selection Board, an Italian, of trying to get fellow Italians, including Mr P. and Mr V., appointed to A5 posts before he retired.

He asks the Tribunal to find that the appointing authority committed an abuse of authority; to appoint him to grade A5 with retroactive effect as from 1 May 1991 instead of Mr V., and from grade A6 as from 1 May 1993; to delete the comment in the minutes of the DG3 Selection Board, dated 2 May 1996; and to quash Mr P.'s appointment and reappointment and order Mr P.'s relegation to A3 with retroactive effect as from December 1991. He also seeks the quashing of "all the unlawful appointments and promotions of other officials", the prohibition of their future reappointment and their relegation to their former grades with retroactive effect. He claims costs.

C. The EPO replies that the complaint is partly irreceivable. The complainant's claim to the quashing of Mr V.'s appointment is receivable, but the claim to his own appointment at grade A5 is not because the Tribunal is not competent to order such a measure. Besides, any objection to his not being appointed to grade A5 in May 1991 should have been made within the statutory time-limit. In the EPO's view, the comment on his performance in the Selection Board's minutes is not an actionable decision. His claim to the quashing of Mr P.'s reappointment is also irreceivable because that decision simply confirmed the earlier one to appoint him. As to his claim to the quashing of all "unlawful appointments and reappointments" it is an *actio popularis* and therefore irreceivable; it is also irreceivable because all but one of the appointments he impugns were in fact reappointments.

On the merits, the Organisation asserts that a member of a board of appeal holds a special position for which there are specific conditions of eligibility. Even though appointment to such posts involves promotion to grade A5, it is not an ordinary promotion within the meaning of Article 49 of the Service Regulations. Furthermore, however good, his reports are not sufficient proof that he was the best candidate for appointment to a board of appeal, nor can they take precedence over the conclusions of a selection board whose members know by experience what such a post requires. The Organisation adds that the accusation of favouritism towards Italian candidates is unfounded: a Frenchman was appointed to a board of appeal in 1993. Consequently, the President of the Office did not exceed his discretionary authority by not proposing the complainant's nomination to the Administrative Council, and the latter was not wrong to reject his appeals.

Turning to Mr P.'s reappointment, the EPO submits that the complainant's pleas are no more relevant than the ones he put forward in challenging Mr P.'s appointment, which Judgment 1559 has made "unchallengeable". The complainant has failed to prove that the appointments he challenges are unlawful: his arguments are pure conjecture based on an "overestimation" of his own worth and alleged persecution.

D. In his rejoinder the complainant contends that the EPO's vain attempts to rebut his appeals show that it was "cornered". In his view, his performance reports take precedence over the Selection Board's conclusions. He maintains that he was a victim of "systematic and prolonged discrimination".

E. In his observations Mr V. says that he is "quite satisfied" that his appointment fully complied with the rules of procedure.

F. In his additional comments the complainant states that he infers from the stance taken by Mr P., Mr V. and Mr E. that they are convinced that their appointments are unlawful.

G. In its final brief the EPO accuses the complainant of being "systematically disparaging" in his comments, an attitude hardly compatible with the "composure" required of a member of a board of appeal.

## CONSIDERATIONS

1. The facts which prompted this complaint are set out in Judgments 1559, 1832 and 1891 in which the Tribunal ruled on Mr Durand-Smet's first, second and third complaints.

The gist of the case is as follows. The complainant joined the EPO in 1980 as an examiner and was promoted to grade A4 in 1989. In 1991 he applied for a post as member of a technical board of appeal at grade A5. He was unsuccessful and the post was given to another candidate, Mr P., who held grade A3. In 1993 the complainant again applied unsuccessfully. In 1994 he asked the President of the Office to promote him to grade A5 as from 1 May 1991 and to grade A6 as from 1 May 1993. Having received no reply he filed an internal appeal against the implied rejection. That appeal failed and he came to the Tribunal which ruled in Judgment 1559 that his claims were time-barred and so irreceivable, and dismissed the complaint.

Having applied yet again for membership of a board of appeal, the complainant was informed on 8 July 1996 that the post had been given to another candidate, Mr V., an A4 examiner.

He lodged an internal appeal against that decision on 11 July 1996, but was informed by a letter of 11 November 1997 that the President of the Office had rejected it. He returned to the Tribunal, which, in Judgment 1832, quashed the impugned decision insofar as it related to his claims challenging the appointment of Mr V. and the rejection of his own application, sent the case back for decision to the Administrative Council of the EPO, which is alone competent to make appointments to boards of appeal, and dismissed his other claims.

In the course of his first internal appeal the complainant learned of a comment concerning him in the minutes of the Selection Board. On 17 November 1997 he lodged a second internal appeal, this time with the President of the Administrative Council, seeking either the deletion of the comment or disclosure of the minutes in full.

On 6 February 1997 he filed a third appeal objecting to the reappointment in December 1996 of a member of a board of appeal, Mr P. He asked the Organisation:

(a) to quash Mr P.'s appointment and reappointment and regrade Mr P. at A3 with retroactive effect as from December 1991;

(b) to quash the unlawful appointment and promotion of other officials and ban their future reappointment, and to relegate the staff members concerned to their former grades with retroactive effect;

(c) to promote him to grade A5 as from 1 May 1991 and to grade A6 as from 1 May 1993.

On 4 March 1999 he lodged a fourth internal appeal against the appointment of Mr E. to a board of appeal and his promotion straight from A3 to A5 on the grounds that it was in breach of the Service Regulations.

On the recommendation of the Appeals Committee, the Council decided unanimously at its 78th Session held in Munich on 8 and 9 December 1999 to reject the complainant's four appeals. The complainant was so informed on 10 December 1999 by a letter from the Chairman of the Administrative Council.

That is the decision he is challenging in this complaint.

The persons named by the complainant in the course of the proceedings were invited to submit comments. In response, Mr E. endorsed the defendant's reply and Mr V. deemed his appointment to be fully in conformity with the rules of procedure. Mr P. did not respond.

2. The complainant asks the Tribunal:

(a) to find his complaint receivable and well-founded;

(b) to rule that there was abuse of authority on the part of the appointing authority;

(c) to appoint him to grade A5 instead of Mr V. with retroactive effect from 1 May 1991;

(d) to delete the comment contained in the minutes of the Selection Board of DG3, dated 2 May 1996;

(e) to quash Mr P.'s appointment and reappointment and to regrade him at A3 with retroactive effect as from December 1991;

(f) to quash all the unlawful appointments and promotions of other officials and ban their future reappointment, regrading them appropriately with retroactive effect;

(g) to appoint him to grade A6 with retroactive effect as from 1 May 1993; and

(h) to order the EPO to bear the costs.

*Receivability*

3. The EPO submits that the complaint is partly irreceivable insofar as it seeks the complainant's appointment to grade A5, the deletion of the comment in the Selection Board's minutes, the quashing of Mr P.'s reappointment and the quashing of "all unlawful appointments and reappointments".

4. The EPO's objections to the receivability of certain claims are sound:

(a) The appointment of the complainant at grade A5 and subsequently at grade A6

The Tribunal may not make appointments itself. The complainant should have challenged within the statutory time limits the EPO's failure to appoint him to A5 in May 1991. Having failed to do so, he was not entitled to claim such appointment as from 1 May 1991 by challenging Mr V.'s appointment in September 1996 or Mr P.'s reappointment in December 1996 (see Judgment 1559).

The Tribunal is neither competent to order the complainant's appointment at grade A5, nor is it competent to order his promotion to A6.

(b) The deletion of the comment in the Selection Board's minutes

Contrary to what the complainant thinks, the Selection Board's minutes are neither a decision by the EPO nor an item from the complainant's personal file. What the Board gives is an opinion to guide the President of the Office in his proposals to the Administrative Council, and this is not open to challenge.

(c) The quashing of all the unlawful appointments and promotions of other officials and the prohibition of their future reappointment

As the EPO rightly observes, the claim cannot be allowed in that form: the complainant should have identified the decisions he deemed unlawful and, if they affected him adversely, challenged them within the prescribed time limits if he thought he qualified for a post to which some other official had been appointed.

Concerning more particularly the appointment of Mr E., the complainant fails to show any actual and present injury arising from that appointment: Mr E. specialises in electricity and physics and the complainant, whose speciality is mechanics, does not claim appointment in his stead.

*The merits*

5. As the Tribunal has held in many judgments, a decision by an international organisation to make an appointment is a discretionary one and as such is subject to only limited review. It may be quashed only if it was taken without authority, or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence. Moreover, the Tribunal will exercise its power of review with special caution in such cases and will not replace the organisation's assessment of the candidates with its own (see Judgment 1497, *in re* Flores).

6. The complainant takes the Organisation to task for turning down his application of 19 March 1996 for membership of a board of appeal at grade A5 and for appointing Mr V. to the post with effect from 1 January 1994. He also objects to the reappointment of Mr P.

Those decisions, he says, are in breach of the Service Regulations, particularly Article 4(1) and 49(7), and of the principle of equal treatment.

7. The Tribunal observes that appointment to a board of appeal is subject to a special procedure, different from the one established in Annex II to the Service Regulations. As the EPO points out, the members of boards of appeal hold a special position in the Office because they are called upon to take decisions as the last instance in the procedure for the grant of European patents. Appointment to a board of appeal confers grade A5 on the incumbent. But it is not an ordinary promotion within the meaning of Article 49(1)(d) of the Service Regulations, since such appointments are governed by different rules.

Article 11(3) of the European Patent Convention says:

> "The members ... of the Boards of Appeal ... shall be appointed by decision of the Administrative Council, taken on a proposal from the President of the European Patent Office ..."

Article 49(1) of the Service Regulations states that:

> "A permanent employee may obtain a higher grade by a decision of the appointing authority:
>
> (a) following appointment to a post under the provisions of Article 11 of the [European Patent] Convention;
>
> ...
>
> (d) by promotion to a post in the next higher grade in the same category;
>
> ..."

It is in the light of the above rules and of the case law that the lawfulness of the decisions under challenge must be determined.

8. The complainant submits that, although the authority to appoint staff members to boards of appeal is vested in the Administrative Council, the President of the Office remains competent as to their promotion "under the conditions laid down in Article 49" of the Service Regulations. Furthermore, he says, an A4 examiner may not be appointed to a board of

appeal at grade A5 unless the requirements for promotion from A4 to A5 are met.

That assertion is contradicted by the provisions of the second paragraph of Article 7(1) of the Service Regulations, which says:

> "A procedure other than that of competition may be adopted by the appointing authority for the recruitment of the senior employees referred to in Article 11 of the European Patent Convention ..."

and by Article 11 of the Convention.

Those provisions are quite clear: the appointment of the employees covered by Article 11 of the Convention and hence that of members of boards of appeal is governed by special rules.

Article 7 of the Service Regulations provides for a different procedure for appointments to boards of appeal from the one set forth in Annex II to the Regulations and Article 49(1)a). Consequently, there is no need to keep to the criteria set by the President of the Office under Article 49(7) of the Service Regulations or any other criteria – seniority for instance – ordinarily applied in promoting staff members. Recruitment to boards of appeal calls for more general criteria, such as those set in Article 5 of the Regulations, which focus on the highest standards of ability, efficiency and integrity. And in assessing ability, the special duties that members of boards of appeal have to perform must be borne in mind.

It is clear from the material rules that there is no right to promotion under Article 49(1)d) any more than there is any right to nomination by the President of the Office under Article 11 of the Convention or to appointment by the Administrative Council. Both the President of the Office and the Council enjoy broad discretion in these matters.

9. In view of the foregoing, the Tribunal cannot accept the complainant's reasoning that, because he had held grade A4 for more than two years and had a good performance record and broad professional experience, he was entitled under Article 49(1)d) of the Service Regulations to promotion with retroactive effect from 1 May 1991.

As reaffirmed in Judgment 1827 (*in re* Ochani), the case law has it that a good performance record does not in itself justify promotion to a higher grade. Consequently, it did not justify the promotion of the complainant to grade A5 to perform the duties of a member of a board of appeal, which are different from those of an examiner. The recommendations of his reporting officer, which the complainant relies on, are no substitute for the conclusions of a selection board composed of officials of DG3 and chairmen of boards of appeal who know by experience what the post demands. The Selection Board noted in the complainant's case that he was too inflexible and narrow-minded in his opinions, that he paid too much attention to detail, was ill-prepared and showed little interest in the work of boards of appeal.

10. The conclusion is that there was no breach of the rules governing the appointment of members of boards of appeal and their promotion to grade A5. Nor were there any other irregularities warranting the quashing of the Administrative Council's decision. Furthermore, the complainant produces not a shred of evidence in support of his allegation of abuse of authority. Consequently, the complaint cannot succeed.

## DECISION

For the above reasons,

The complaint is dismissed.

**In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

***(Signed)***

**MICHEL GENTOT** **JEAN-FRANÇOIS EGLI** **SEYDOU BA**

**CATHERINE COMTET**

**Organisation internationale du Travail**
***Tribunal administratif***

**International Labour Organization**
***Administrative Tribunal***

# NINETIETH SESSION

***In re* Fattah (No. 2)** **Judgment No. 2041**

THE ADMINISTRATIVE TRIBUNAL,

**Considering the second complaint filed by Mr Nasser Dahab Abdel Fattah against the Food and Agriculture Organization of the United Nations (FAO) on 15 December 1999 and corrected on 9 March 2000, the FAO's reply of 26 June, the complainant's rejoinder of 13 July and the Organization's surrejoinder of 25 August 2000;**

**Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;**

**Having examined the written submissions and disallowed the complainant's application for hearings;**

**Considering that the facts of the case and the pleadings may be summed up as follows:**

**A. The complainant is a former official of the FAO who worked as a driver at the FAO's Regional Office for the Near East in Cairo (Egypt). His employment ended in the circumstances recounted in Judgment 1900 on his first complaint. As mentioned in that judgment his contract, which was due to expire on 31 March 1997, was extended for a period of six months and he was separated on 30 September 1997.**

**On 7 September 1997, after five days of annual leave, the complainant applied for one month's "certified sick leave" and submitted a medical certificate that was issued in Aswan. The FAO Medical Service wanted the**

complainant to be examined in Cairo before it took a decision on the matter. On 29 September a staff member from the Regional Office went to the complainant's home in Cairo to ask his family to pass on that information to him in Aswan. The complainant sent in another medical certificate and request for sick leave on 1 October. The Chief of the Management Support Unit at the Regional Office wrote to him on 26 October and told him that his application for sick leave could not be considered unless he returned to the duty station to be examined by a doctor chosen by the FAO. He asked him to make an appointment within five days with the United Nations designated physician in Cairo named in the letter.

On 27 November 1997 the complainant appealed to the Director-General against the decision to separate him from service while he was on sick leave: he requested payment of salary until his recovery. He cited Manual paragraph 323.512 which specifies that if on the date of separation a staff member is on certified sick leave "the effective date of separation will be extended until the end of his/her period of certified sick leave". He indicated that he had been hospitalised in Aswan and had not been fit enough to travel to Cairo, but would undergo the examination when his doctor considered him well enough to make the journey.

The complainant had meanwhile submitted further medical certificates. In a letter of 9 December 1997 the Personnel Officer at the Regional Office told him that the Medical Service would not be able to take the certificates into consideration unless he underwent the medical examination in Cairo. On 16 January 1998 the Officer-in-Charge of the Personnel Division wrote to the complainant informing him that the Medical Service had not approved his application dated 7 September 1997; that his appointment had expired on 30 September 1997; and that, since his absence from 8 to 30 September constituted unauthorised leave, that period would be charged to his accrued annual leave.

In a letter of 26 January 1998, the Assistant Director-General in charge of Administration and Finance informed the complainant that the Director-General had dismissed his appeal of 27 November 1997. On 3 March the complainant travelled to Cairo. He was examined, as required, by the United Nations designated doctor; the Organization also regarded it as his exit medical examination. He appealed to the Appeals Committee on 4 March against the Director-General's decision. In his appeal he objected to the fact that the Organization wanted to treat the medical examination as being for exit purposes and said it should be held merely to confirm whether he could be granted sick leave from 7 September. He claimed payment of salary until his recovery. In its report of 6 July 1999 the Appeals Committee recommended that the complainant's "exact medical status ... be determined" and depending on his "potential entitlements to sick leave" his contractual status with the FAO should be clarified. In a letter of 4 October 1999, received by the complainant on 13 October, the Director-General rejected his appeal. That is the decision which the complainant impugns.

B. The complainant takes issue with the fact that his sick leave was not recognised. He submits that there was delay both in hearing his appeal and in communicating the Committee's report to him. He also blames the FAO for denying him his "financial rights", i.e. his salary for the period "from 7 September 1997 [to] 19 August 1998", and for paying no heed to the recommendations of the Appeals Committee. There was, he says, no "continuous cooperation and follow-up" between the Regional Office and FAO headquarters and the impugned decision constitutes evidence of the Organization's "bad" attitude towards him.

He is claiming an award of 5 million United States dollars in compensation for: (1) the "psychological and financial" harm he suffered as a result of the Director-General's final decision; (2) the FAO's hindrance to his efforts to find a new job; (3) an accident of 13 March 1997; (4) the fact that he was "injured from work" as found in the doctor's report of March 1998; (5) the fact that subsequent to that accident the Organization failed to take account of Manual paragraph 323.221 regarding payments to the Group Life, Accident and Disability Insurance plan (GLADI); (6) medical expenses for treatment from 7 September 1997 to 19 August 1998 as well as the cost of travelling to and from hospital three times a week for one year; and (7) postage, fax, translation and typing costs.

C. In its reply the Organization contends that the complainant failed to comply with the Chief Medical Officer's request to undergo the required examination and was therefore not on recognised sick leave. He was therefore lawfully separated from service.

The FAO points out that, under Staff Rule 302.6216, it is the Chief Medical Officer who recommends, on the basis of the medical certificates submitted, whether sick leave should be granted. Moreover, according to Rule 302.6217 a staff member who is sick "may be required at any time ... to undergo examination by a medical practitioner named by the Director, Personnel Division". Its request that the complainant should be examined by a designated practitioner was therefore in line with the provisions of the Manual and established practice. By failing to provide evidence that he was medically unfit to travel the complainant forfeited any sick leave entitlements that he might otherwise have had. There was no indication on the medical certificate issued in Aswan on 7 September 1997 that the complainant was hospitalised or unfit to travel and none of the medical certificates that he subsequently submitted indicated that he was unable to undergo the examination for medical reasons.

The Organization adds that it made every reasonable effort to inform the complainant that it was necessary for him to be examined in Cairo. It explains that full separation procedures were still pending when the complainant's employment ended in September 1997, which is the reason why the examination in Cairo in March 1998 was treated as an exit medical examination.

The FAO says that although the complainant believes that his illness is service-incurred he has never submitted such a claim to the Organization and there is, therefore, no administrative decision to be reviewed. His claim on that score is therefore irreceivable.

D. In his rejoinder the complainant asks for a review of the date of his separation. He contends that it was not lawful for his employment to have ended on 30 September 1997. The six-month extension that he was granted should not have been calculated from 31 March 1997 because at that date he was also on sick leave. It should have run from 17 June 1997 – the day after that period of sick leave had ended – in line with Manual paragraph 323.512.

E. In its surrejoinder the FAO points out that its rules do not provide for further extension of a contract because sick leave has been taken during an extension period. Manual paragraph 323.512 provides for postponement of separation if a staff member is on "certified sick leave" on the actual date of separation. The complainant was not on sick leave then and was therefore not entitled to further extension. It points out that the six-month extension of his contract was granted, at the complainant's request, as a goodwill gesture on the part of the Organization.

## CONSIDERATIONS

1. The complainant was recruited as a driver at grade G.3 on 1 January 1992 at the FAO's Regional Office for the Near East in Cairo. His one-year fixed-term appointment was renewed annually up to 31 December 1996 and was later extended to 31 March 1997, and then to 30 September 1997. The non-renewal of his contract was the subject matter of Judgment 1900.

2. On 28 August 1997 the complainant applied for and was granted five days' annual leave. On 7 September, while in Aswan, he submitted an application for sick leave from 7 September to 6 October 1997 together with a medical certificate issued in Aswan indicating that he should have thirty days' rest and then return for a check-up after one month. No residential address was given and there was no indication that he was unable to travel or that he was hospitalised.

3. By an e-mail of 22 September 1997 a medical officer at headquarters advised the Finance/Administration Officer at the Regional Office that the complainant should be requested to return to Cairo as soon as possible and that he would arrange an examination for him. On 29 September 1997 a member of staff went to the complainant's address in Cairo to ask his family to inform him of the medical officer's request. No response was received to this message.

4. On 1 October the complainant submitted another request for sick leave until 5 November 1997.

5. The Chief of the Management Support Unit wrote to the complainant on 26 October 1997 saying that sick leave from 7 September to 5 November 1997 could not be considered unless he returned to his duty station in Cairo to be examined by a United Nations doctor of the FAO's choice. He was requested to attend a full medical examination by the doctor named in the letter and to make an appointment with him within the next five days. The letter was handed to the complainant's wife on 27 October. The complainant did not respond, although on 29 October 1997 his doctor in Aswan wrote to the Organization acknowledging that he had no objection to cooperating with the Organization's doctor.

6. The complainant sent a succession of medical certificates covering the period up to 4 March 1998 each prescribing thirty days' rest. Some stated that he was to return for a check-up after one month. A report from the complainant's doctor, received by the Regional Office on 23 November 1997, said that the complainant was suffering from depression.

7. A personnel officer at the Regional Office wrote to the complainant on 9 December 1997 informing him that his medical certificates could not be taken into consideration unless he had a medical examination in Cairo. Several unsuccessful attempts were made to deliver the letter. On 28 December 1997 his family confirmed that the complainant had told them not to take delivery of anything from the FAO.

8. On 14 March 1998 he was finally examined in Cairo by a United Nations designated doctor. This examination was also treated as an exit medical examination under Manual paragraph 314.74. The designated doctor found him fit for work but not as a driver. He said he could have performed "any other office work not requiring special alertness".

9. Meanwhile the complainant started an internal appeal procedure by writing to the Director-General on 27 November 1997 to complain about the non-payment of his salary for October and November. The Director-General refused his appeal in a letter of 26 January 1998 and the complainant then appealed to the Appeals Committee.

10. In the context of this appeal the complainant submitted a further certificate dated 14 March 1998 stating that he had been hospitalised in Aswan and had not been medically fit to travel between 7 September 1997 and 3 March 1998.

11. In its report dated 6 July 1999 the Appeals Committee queried why the examination had not been conducted earlier in either Aswan or Cairo: indeed it felt that the complainant's medical status should have been verified in Aswan. It recommended that the exact medical status of the complainant should be determined as soon as possible and his "contractual status ... clarified".

12. By a letter dated 4 October 1999 the Director-General did not accept the recommendation and rejected the appeal. This is the decision impugned.

13. The complainant seeks 5 million United States dollars in compensation.

14. Manual paragraph 323.512 provides:

> "If a staff member is on certified sick leave on the date of separation the effective date of separation will be extended until the end of his/her period of certified sick leave."

15. Staff Rule 302.6217 provides:

> "Staff members may be required at any time to submit medical certificates as to their condition, or to undergo examination by a medical practitioner ..."

16. At the material time Manual paragraph 323.331 provided:

> "Certified sick leave shall be granted subject to the approval of the Chief, AFPM (Medical Service), on the basis of the medical certificate."

17. It is clear that the complainant was never on certified sick leave because the Chief Medical Officer never approved it.

18. The onus is on a staff member who wishes to benefit from certified sick leave to ensure that any requirements of the Organization are complied with. It is not enough merely to send in an application with a medical

certificate. Contact with the Organization must also be maintained. The complainant achieved nothing by remaining uncontactable (as far as the Organization was concerned) in Aswan.

19. The FAO was entitled to view with suspicion the certificate dated 14 March 1998, issued at appeal stage, to say that he had been hospitalised in Aswan and unable to travel between 7 September 1997 and 3 March 1998. If he was hospitalised and unable to travel those facts should have been communicated at the very beginning so that they could have been verified at the time.

20. Since the complainant was not on certified sick leave on the date of separation, Manual Paragraph 323.512 does not apply and accordingly there was no need to defer the separation.

21. The complaint therefore fails.

## DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

*Registry's translation,*
*the French text alone*
*being authoritative.*

# NINETIETH SESSION

***In re* Fattah (No. 3)**
**(Application for review)**

**Judgment No. 2042**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1900 filed by Mr Nasser Dahab Abdel Fattah on 20 March 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

## CONSIDERATIONS

The complainant seeks a review of Judgment 1900 dismissing his complaint in which he claimed the quashing of a decision of 15 June 1998 taken by the Director-General of the Food and Agriculture Organization of the United Nations (FAO). He submits that the Tribunal overlooked facts relevant to his dispute with the Organization. However, he puts forward no plea warranting review of the Tribunal's judgment, which is *res judicata*. His application therefore being clearly irreceivable, the Tribunal dismisses it under the summary procedure provided for by Article 7 of its Rules.

## DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT MELLA CARROLL HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

*Registry's translation,*
*the French text alone*
*being authoritative.*

# NINETIETH SESSION

***In re* Lustig de Schönstein (No. 3)**
**(Application for review)**

**Judgment No. 2043**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1464 filed by Mrs Sonia Lustig de Schönstein on 2 May 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

## CONSIDERATIONS

1. The complainant is asking for the review of Judgment 1464 in which the Tribunal dismissed her first complaint filed against the United Nations Industrial Development Organization (UNIDO) regarding her entitlement to compensation for service-incurred illness. She states that she has discovered new facts that are likely to call into question the ruling in that judgment and which emerged too late for her to bring them to the attention of the Tribunal at the appropriate time.

2. None of the facts developed by the complainant at length in her application for review can be considered as a new fact which would have significantly influenced the outcome of her case if it had been known earlier. Moreover, the legal and factual arguments that she puts forward do not

constitute pleas of a kind that could affect the final ruling handed down by the Tribunal.

3. Furthermore, if the complainant wishes to put forward new claims, stemming from new pleas, to obtain redress from UNIDO, it is not through an application for review that they should be brought before the Tribunal.

4. Since her application is clearly irreceivable, the Tribunal will dismiss it summarily under the procedure provided for in Article 7 of its Rules.

## DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT MELLA CARROLL FLERIDA RUTH P. ROMERO

CATHERINE COMTET

***Registry's translation, the French text alone being authoritative.***

# NINETIETH SESSION

***In re* Hermantin**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Danielle Raymonde Hermantin against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 24 February 2000 and UNESCO's reply of 31 March 2000;

Considering that by a letter of 6 June 2000 the complainant informed the Registrar of the Tribunal that she wished to withdraw suit;

Considering that by a letter of 16 June 2000 the Organization informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

## DECISION

The withdrawal of suit is hereby recorded.

**In witness of this judgment, adopted on 9 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.**

**Delivered in public in Geneva on 31 January 2001.**

***(Signed)***

**MICHEL GENTOT** **JEAN-FRANÇOIS EGLI** **SEYDOU BA**

**CATHERINE COMTET**

**Organisation internationale du Travail**
***Tribunal administratif***

**International Labour Organization**
***Administrative Tribunal***

***Registry's translation,***
***the French text alone***
***being authoritative.***

# NINETIETH SESSION

***In re* Iacobelli**

**THE ADMINISTRATIVE TRIBUNAL,**

**Considering the complaint filed by Mrs Manuela Iacobelli against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 12 November 1999 and Eurocontrol's reply of 21 February 2000;**

**Considering that by a letter of 2 May 2000 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;**

**Considering that by a letter of 17 May 2000 the Organisation informed the Registrar that it had no objection to the withdrawal of suit;**

**Considering that suit is unreservedly withdrawn;**

## DECISION

**The withdrawal of suit is hereby recorded.**

In witness of this judgment, adopted on 9 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

# NINETIETH SESSION

***In re* Müller-Engelmann (No. 10)**

**THE ADMINISTRATIVE TRIBUNAL,**

**Considering the tenth complaint filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 16 November 1999 and corrected on 20 December 1999, and the EPO's reply of 19 April 2000;**

**Considering that by a letter of 7 August 2000 the complainant informed the Registrar of the Tribunal that she wished to withdraw suit;**

**Considering that by a letter of 4 September 2000 the Organisation informed the Registrar that it had no objection to the withdrawal of suit;**

**Considering that suit is unreservedly withdrawn;**

## DECISION

**The withdrawal of suit is hereby recorded.**

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

**Organisation internationale du Travail** **International Labour Organization**
***Tribunal administratif*** ***Administrative Tribunal***

# NINETIETH SESSION

***In re* Müller-Engelmann (No. 11)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 16 November 1999 and corrected on 21 January 2000, and the EPO's reply of 19 April 2000;

Considering that by a letter of 7 August 2000 the complainant informed the Registrar of the Tribunal that she wished to withdraw suit;

Considering that by a letter of 4 September 2000 the Organisation informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

## DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

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